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Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN
ASSOCIATIONS, ET AL., *Petitioners*

v.

THE UNITED STATES, *Respondent*

On Writ of Certiorari to the United States Court of Claims

APPENDIX

Relevant Court of Claims Docket Dates

October 5, 1966—Petition filed.

February 3, 1967—Answer filed.

August 9, 1967—Defendant's Motion for Summary Judgment filed.

August 9, 1967—Stipulation as to Exhibits filed.

October 16, 1967—Cross-Motion for Summary Judgment filed.

June 14, 1968—Decision of Court of Claims.

THE UNITED STATES COURT OF CLAIMS

Court of Claims No. 344 66

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN ASSOCIATIONS, THE SOJOURNER'S LODGE, MASONIC TEMPLE, and THE COMMERCE AND INDUSTRY INSURANCE COMPANY,
Plaintiffs,

v.

THE UNITED STATES, Defendant.

Petition

1. This is an action for just compensation for real property appropriated to public use and damages resulting from the U. S. Army's seizure, use and occupation of plaintiffs' property.

2. Plaintiffs herein are citizens of the United States; their claims exceed \$10,000 each and are founded upon: (1) the Fifth Amendment to the United States Constitution; (2) § 2733 of the Military Claims Act, 10 U.S.C. § 2731, *et seq.*; (3) § 536.14 of Army regulations pertain-

ing to military claims, 32 C.F.R. § 536.1, *et seq.*; (4) implied contracts with the United States; and (5) are for liquidated damages in cases not sounding in tort. This Court has jurisdiction under 28 U.S.C. § 1491, as hereafter more fully appears.

3. The claims in question arise out of the Army's seizure, use and occupation of plaintiffs' real property during the Panamanian riots of 1964. The pertinent facts relating to the Army's appropriation and use of plaintiffs' property were established in an official U.S. presentation before the Organization of American States entitled *Background And Chronology Of The Events In Panama And The Canal Zone On The Ninth, Tenth, And Subsequent Days In January 1964* (hereinafter referred to as "U.S. Presentation"). They were later amplified in a "Fact Sheet" (hereinafter referred to as "Fact Sheet"), prepared by Mr. Alfred B. Fitt, General Counsel of the Army, attached to a letter dated 17 March 1965 to Mr. Ronald A. Jacks, counsel for plaintiffs herein. The pertinent facts and the document in which they appear are set forth below in paragraphs 4 through 21.

4. "The rioting in the Cristobal-Colon area began on the night of January 9, 1964, a few hours after rioting had already begun on the Pacific side of the Isthmus. The events as they occurred in the area of the Masónic Temple and the YMCA area were described in the United States presentation before the Committee established under the resolution of the OAS:

"The first indications of trouble in the Cristobal-Colon area . . . were noted at 8:00 p.m. At that time about a dozen singing, shouting persons, carrying a Panamanian flag, were observed as they marched on Bolivar Street past the front of the Cristobal Armed Services Y.M.C.A." (Fact Sheet, p. 1, citing U.S. Presentation, p. 50).

5. "By 9:14 p.m., a mob of 1,500 persons had formed. The mob entered the Canal Zone, proceeded to the Panama Canal Administration Building, and raised a Panamanian flag. At this time, the mob was described as not violent, but nevertheless unruly and clearly affected by the action of agitators. At 9:30 p.m., the mob left the area of the Administration Building, and in a disorderly manner, headed along 11th Street and past the Masonic Temple." (Fact Sheet, p. 1).

6. "A group of teenage girls leaving the Masonic Temple after a meeting nearly became enveloped by the mob as it moved past on its return to Colon. A retired U.S. Army Sergeant, residing at the nearby Y.M.C.A., stood by with a shotgun he owned to protect the girls. Without having fired it, he turned his shotgun over to Canal Zone police later that night. Soon after the girls left, a barrage of rocks and other missiles was thrown at the Masonic Temple." (U.S. Presentation, p. 51).

7. "By 9:45 p.m. a crowd of about 400 persons had gathered at the intersection of 11th and Bolivar Avenue in Colon. Held there in check briefly by the National Guard, the demonstrators pressed on down 11th Street to Balboa Avenue. At almost 10:15 p.m., after again being briefly checked by the National Guard, a contingent of the mob surged up Balboa Avenue to a point near the Y.M.C.A. While police officers attempted to calm the forward contingent of the mob, windows could be heard being broken in Panama Canal offices adjacent to the main body of the crowd. The destruction by elements of the mob became more extensive. Windows and doors in the Panama Canal Company Office and Storage Building were broken; furniture was dragged out into the street; and pieces of office equipment were destroyed or stolen. . . . Besides the damage to the Panama Canal Company Office and Storage Building, extensive damage was incurred in the Masonic Temple and the Y.M.C.A.

While police were preoccupied on Balboa Avenue, other rioters entered the Cristobal Y.M.C.A. on Bolivar Avenue, looted the gift shop, destroyed furniture, and overturned file cabinets." (U.S. Presentation, pp. 52-53).

8. "The commanding officer of the 4th Battalion, 10th Infantry had been alerted at 8:50 p.m., but was not given the order to move until 9:50 p.m. The order which he received from higher headquarters directed him to move to the Cristobal area, and assigned him the mission to clear the Canal Zone of rioters, and to seal the boundary between the Republic of Panama and the Canal Zone." (Fact Sheet, p. 2).

9. "At about 10:15, the battalion, consisting of about 700 men, arrived in the area of Pier 9 in Cristobal. The battalion commander went forward toward the Zone boundary to reconnoiter the situation. As described above, the rioting had already reached a frenzied pitch. In his testimony before the International Commission of Jurists, the commander described the situation as he arrived on the scene:

"I first went to the intersection of Front Street and 11th Street; I circled back to Terminal Street, and I noticed that there was approximately 300 rioters scattered throughout the area from the intersection of Front Street and 11th, by the Commissary Building, around the Masonic Building and to the rear of the Y.M.C.A.

"I returned quickly to Pier 9, picked up Company 'A', returning to the intersection of 11th and Front Street. I had the troops to dismount, put on their gas masks, put the bayonets on their weapons, and formed into a riot control formation. The order of the Commander was to move down the right side of 11th Street, to drop personnel off sealing the border as they went.

'At this point, my Executive Officer arrived on the scene. I requested that he stay with Company 'A'. I told him I would return to get Company 'B', and commit Company 'B' up Terminal Street to clear the area between 13th and 14th Street and to seal the border.

'After committing Company 'B', I returned back to Company 'A' to see what action was taking place.'"
(*Id.*, p. 3).

10. "Complying with the battalion commander's order, Company A had moved in column formation down 11th Street, staying within the Zone, dropping off men as they went to form a cordon sealing off the border. The Company turned right onto Balboa Avenue, and went into the echelon formation frequently used for riot control purposes. The echelon was to the left, so that rioters forced to withdraw before the troops would be urged to retreat through alleys between the Masonic Temple and YMCA, and thence back across the Zone Boundary on Bolivar Avenue and into the Republic." (*Ibid.*).

11. "After a scuffle with the rioters, the troops continued along Balboa Avenue until they reached 13th Street. Groups of men were left at intersections to move up to the boundary along Bolivar Avenue. When the main body of Company A reached 13th Street, it faced about, retraced the route up Balboa Avenue, turned right onto 11th Street, and began to advance toward the intersection of 11th and Bolivar." (*Id.*, p. 4).

12. "At this point, about 15 Panamanians, who had been ransacking the Masonic Temple, began jumping from the windows on the first and second floors onto the troops passing by below on 11th Street. These rioters were promptly ejected from the Zone by the troops, who then linked up with the other troops of the company who had been detached from the main body of the company, and

who had made their way up 12th and 13th Streets to Bolivar Avenue. The salient formed by the Zone boundary along 11th Street and Bolivar Avenue was sealed, and the mob cleared from the Canal Zone area within the salient. This area included the Masonic Temple and the YMCA." (*Ibid.*).

13. "The troops were confronted with a mob estimated by the company commander to be approximately 3,000. This mob began to assault the troops with a shower of rocks, bricks, plate glass, and Molotov cocktails. Two soldiers of Company A were wounded by bullets. Others were seriously injured by the flying debris and Molotov cocktails. Once, the rioters attempted to push an automobile through the cordon of troops, but the vehicle collided with other rioters." (*Ibid.*).

14. "During these initial hours when the Infantry remained in position on the line, only tear gas grenades were used to contain the mob and discourage their attacks." (*Ibid.*).

15. "Before midnight of the 9th, Company A had sustained many injuries. The battalion commander therefore relieved Company A, pulled it back well to the rear, and replaced it with Company C. Soon after Company C took up positions, one man in the company was shot and killed and at least two others wounded by sniper fire. In order to protect the troops from the sniper fire, around midnight the commanding officer of Company C moved the company back into the Masonic Temple, the YMCA, and the Commissary Building. Company B, whose commander had been wounded and first sergeant killed by sniper fire, also fell back from the Zone boundary, and took up position along the railroad tracks. By morning of the 10th, a third soldier had been killed by snipers, and a total of nine wounded. The troops had not yet returned fire on the snipers." (*Id.*, pp. 4-5).

16. "With the coming of daylight on the 10th, the rioters increased their efforts to burn the buildings on the Zone side of the boundary. Before the ICJ, the battalion commander testified:

'During the morning hours of the 10th, after from around 6:00 a.m. to 12:00 Noon, we received heavy Molotov cocktails in the vicinity of the Masonic Building, the YMCA Building and the Commissary Building.' " (*Id.*, p. 5).

17. "The events of Friday the 10th are described in the OAS presentation:

'At 10:00 a.m. an attack of Molotov cocktails was launched against the Cristobal Y.M.C.A., setting the building on fire. Sniper fire hindered Canal Zone firefighters who attempted to control the blaze. Company C, which had taken up positions in the Y.M.C.A. was forced by the fire to evacuate the building shortly after 2:00 p.m., and the second platoon took up sandbag positions in the parking lot behind the Y.M.C.A.

'The rioters then shifted their attack to the Masonic Temple, again employing Molotov cocktails. The Company was forced to move the command post from the Masonic Temple that afternoon but was able to maintain an observation post on the top floor of the structure.

'The Y.M.C.A. continued to be a target for Molotov cocktails during the day. Sniper activities continued at 12th Street and Bolivar Avenue. The barrage of rocks from across Bolivar Avenue at 11th Street in Colon resumed at 11:38 a.m. During this disturbance, a group of people ran a car up on the sidewalk at 11th Street and Balboa Avenue and set it on fire.

'A group of about 200 people in the area of 11th Street and the railroad tracks was forced back into Colon by the use of tear gas.

'The soldiers who remained in the observation post on the top floor of the Masonic Temple continued to receive heavy sniper fire for two and one-half hours in the evening of Friday, January 10th. That evening at the building of the Cristobal Credit Union, troops of Company B were faced with a group of about 50 people attempting to set fire to the building. The mob was dispersed with the use of tear gas while Canal Zone firemen extinguished the fire.'" (*Id.*, pp. 5-6, citing U.S. Presentation, pp. 57-59).

18. "In addition to the attacks with rocks and Molotov cocktails, heavy sniper fire continued throughout the 10th and into the 11th, when two soldiers on the top floor of the Masonic Building were wounded. Finally, in the early afternoon of the 11th, the battalion commander reported to Army headquarters that his unit had sustained an alarming number of casualties (3 dead, 15 wounded). Headquarters therefore granted permission to return fire on snipers using shotguns only. Selected marksmen were then authorized to fire on known snipers." (Fact Sheet, p. 6).

19. "The harassment from stones and Molotov cocktails continued. On the morning of the 12th, Panamanians throwing Molotov cocktails from the Olimpia Bar succeeded in setting fire to the second story of the Masonic Temple. Since the battalion commander had been authorized to return fire on snipers only, he did not fire on the people throwing Molotov cocktails." (*Ibid.*).

20. "In the early morning hours of the 13th, the Guardia Nacional took official control of the Colon side of the boundary, searching all houses along their side of the boundary. Hostile action in the area thereafter ceased." (*Id.*, p. 7).

21. In his "Fact Sheet," the General Counsel of the Army concluded that the facts related above "may be

ascertained from a reading of the United States presentation before the OAS, as well as the testimony before the International Commission of Jurists and the Report issued by that committee. A thorough examination of the sworn statements given by Army personnel who were involved in the incidents in the Cristobal-Colon area reveals that these statements fully corroborate the public record." (*Id.*, p. 8).

22. On Monday, January 14, 1964, Lt. Colonel Sachse, Commanding Officer of the 4th Battalion, 10th Infantry, during the riots and Colonel H. C. Harrison, Director of Engineering and Construction for the Panama Canal Co., met with Mr. Rex O. Knight, and Mr. H. E. Salter, of the Masonic Temple, and advised them that the Government wanted to "make certain innovations to the building to protect it in the event of future attack." These included sealing off the ground floor and placing heavy screening over the second and third floor windows. During the discussion Colonel Sachse told Mr. Knight and Mr. Salter that "if it had not been for this building they would have taken the docks. As long as this building is here, I can defend the Zone on this end. If not, we should tear it down and establish a buffer zone."

23. Although the Masonic Temple never gave formal authorization, the Government, acting through the Canal Zone Government and/or the Corps of Engineers, moved in and sealed off the ground floor of the Temple with cinderblocks. Glass blocks were later installed in some portions of the ground floor in order to provide some natural lighting. However, the Government never offered to compensate the Temple for the damage suffered after the Army took over the building, the loss of value due to its permanent alterations, or loss of rental income arising from sealing off the ground floor.

24. Lt. Colonel Sachse and Colonel Bolger from the staff of General O'Meara, Commanding Officer of the U.S.

Forces in the Canal Zone, also inspected the YMCA shortly after the riots for the apparent purpose of determining whether the remains of the building could be used as a fortification in the event of future rioting. However, at no time during or since these visits has the Army or the Canal Zone Government offered to compensate the YMCA for the damages suffered.

25. At the time of the loss, the Commerce and Industry Insurance Company of 2 Park Avenue, New York, New York, had in effect Standard Fire Policy No. 15800, issued to the National Board of the YMCA and covering a number of scheduled locations, including the building in Cristobal. The insured perils included direct loss by fire, but did not cover non-fire loss caused by riot and civil commotion.

26. Upon receipt of claim by the YMCA for the loss in question, Commerce and Industry deducted: (1) the non-fire damage caused by the uninsured perils of riot and civil commotion; (2) the depreciation necessary to reduce the claim to the measure of damages employed in the particular policy, and certain further deductions under the co-insurance clause. After making these deductions, the parties agreed upon total payment under the policy, in the amount of \$110,000. On February 17, 1965, that sum was paid to the insured in return for an executed loan receipt which subrogated Commerce and Industry to \$110,000 of any recovery arising out of the loss.

27. The National Board of the YMCA and the Commerce and Industry Insurance Company make joint claim in this action for the sum of \$212,196. Of this amount, the parties have agreed that Commerce and Industry is entitled to the first \$110,000 of any recovery by virtue of its payment under the policy and the terms of their loan receipt.

28. The basis upon which this joint claim has been computed is set forth in Table A below. Columns (1) and (2) contain the original estimates of loss prepared by the YMCA's registered architect, Mr. Edmund R. MacVittie,

for repairing and/or replacing each item and necessary deductions for salvage and savings. Column (3) contains deductions for property damage which occurred *before* the Army took over the building and is thus nonrecoverable in this action.

TABLE A

CALCULATION OF JOINT CLAIM BY YMCA AND COMMERCE AND INDUSTRY INSURANCE COMPANY

	(1)	(2)	(3)	(4)
Buildings:	Amount of Total Loss at Repair or Replacement	Deductions for Salvage and Savings	Deductions for Nonrecoverable Damage	Amount Claimed
Classroom	85,910	(20,161)	—0—	65,749
Auditorium	84,700	(25,329)	—0—	59,371
Adm. & Dorm.	40,150	—0—	(4,000)	36,150
Contents:				
Classroom	7,018.50	—0—	—0—	7,018
Auditorium	13,112.50	—0—	—0—	13,113
Adm. & Dorm.	27,695	—0—	(12,000)	15,695
Supplies	2,239	—0—	(500)	1,739
Gift Shop	13,625	—0—	(13,625)	—0—
Concessions	11,400	—0—	(11,400)	—0—
Removal of Debris	3,285	—0—	—0—	3,285
Renovation Project	10,076	—0—	—0—	10,076
Totals	299,211	(45,490)	(41,525)	212,196

29. The Sojourner's Lodge of the Masonic Temple, Cristobal, Canal Zone, makes claim in this action for the sum of \$44,620.74. The details of that claim may be summarized as follows:

TABLE B

CALCULATION OF CLAIM OF MASONIC TEMPLE

Replacement of large windows on ground floor	\$ 2,840.00
All other glass breakage	4,840.60
Fire damage to building	25,316.10
Loss to property due to sealing off ground floor	4,824.04
Loss of rent due to sealing off ground floor	6,800.00
TOTAL	\$44,620.74

30. On May 26, 1965, plaintiffs herein filed a joint claim with the United States Department of the Army for the damages in question under § 2733 of the Military Claims

Act and related regulations. The claims were contained in a Standard Form 95 "Claim for Damage or Injury," and accompanied by a "Memorandum in Support of Claim," and attached exhibits.

31. On October 8, 1965, Colonel Paul J. Leahy, Chief of the Army Claims Service, denied plaintiffs' claims on the ground the losses in question were not "incident to non-combat activities" of the Department of the Army and hence not payable under the Military Claims Act.

32. Plaintiff appealed this decision to the Secretary of the Army under 32 C.F.R. § 536.11. Plaintiffs repeatedly requested a copy of the Claims Service's final memorandum to the Secretary detailing the reasons for its denial of their claims. However, they were never allowed to see or respond to that document and thus were effectively deprived of their right of appeal to the Secretary.

33. On August 19, 1965, Mr. John Fitch, Deputy Assistant Secretary of the Army (Financial Management), acting pursuant to delegated authority from the Secretary of the Army, denied plaintiffs' claims on the ground they were not covered under the Military Claims Act.

34. The facts set forth above in paragraphs 4-33 give rise to a claim for just compensation for property appropriated to public use under the Fifth Amendment to the United States Constitution which provides in pertinent part:

... nor shall private property be taken for public use, without just compensation.

35. The facts set forth above in paragraphs 4-33 also give rise to a claim under § 2733 of the Military Claims Act which provides in pertinent part:

Property loss; personal injury or death:

incident to noncombat activities of Department of Army, Navy or Air Force

(a) Under such regulations as the Secretary of a military department may prescribe, he or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than \$5,000 a claim against the United States for—

(1) damage to, or loss of, real property, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property, including property bailed to the United States and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, or Marine Corps, as the case may be; or

(3) personal injury or death;

either caused by a civilian officer or employee of that department, or a member of the Army, Navy, Air Force, or Marine Corps, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department.

.

(d) If the Secretary of the military department concerned considers that a claim in excess of \$5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant \$5,000 and report the excess to Congress for its consideration.

36. The facts set forth above also give rise to a claim under § 536.14 of the Department of the Army regulations covering the application of the Military Claims Act, 32 C.F.R. § 536.1, *et seq.*, which provides in pertinent part:

32 C.F.R. § 536.14 Claims payable.

(a) *General.* Unless otherwise prescribed, a claim for personal injury, death, or damage to or loss of

property, real or personal, is payable under the regulations of §§ 536.12—536.23 when:

(2) Incident to the noncombat activities of the Army.

(c) *Property.* The property for damage or loss of which claims may be settled under §§ 536.12—536.23 includes:

(1) Real property used and occupied under lease, express or implied, or otherwise;

(e) *Noncombat activities.* Claims may be settled under §§ 536.12—536.23 if they arise from authorized activities which have little parallel in civilian pursuits or which historically have been considered as furnishing a proper basis for the payment of claims, such as maneuvers, special field exercises, practice firing of heavy guns or other weapons, practice bombing, operation of aircraft, use of barrage balloons, escape of animals, use of instrumentalities having latent mechanical defects, movement of combat or other vehicles designed especially for military use, and use and occupancy of real estate.

37. The facts set forth above also give rise to an implied contract to compensate plaintiffs for damage to their real property which occurred during the taking and seizure by the Army without due process of law or established requisition procedures and resulting use and occupation.

38. The facts set forth above also give rise to a claim for liquidated damages in a case not sounding in tort within the meaning of 28 U.S.C. § 1491(5).

WHEREFORE, plaintiffs demand:

1. Judgment in favor of plaintiff National Board of the YMCA in the amount of \$112,196.00.
2. Judgment in favor of plaintiff Commerce and Industry Insurance Company in the amount of \$110,000.00.
3. Judgment in favor of the Sojourner's Lodge, Masonic Temple, in the amount of \$44,620.74.

Respectfully submitted,

**NATIONAL BOARD OF THE YMCA
291 Broadway
New York, New York.**

**SOJOURNER'S LODGE, MASONIC
TEMPLE
Box 5076
Cristobal, Canal Zone**

**COMMERCE AND INDUSTRY
INSURANCE COMPANY
2 Park Avenue
New York, New York**

**RONALD A. JACKS
Ronald A. Jacks
815 Connecticut Avenue, N.W.
Washington, D. C.**

Attorney for Plaintiffs

Answer***First Defense***

This Court lacks jurisdiction of the subject matter of the action.

Second Defense

The petition fails to state a claim upon which relief can be granted against the defendant.

Third Defense

1. The defendant admits that paragraph 1 of the petition correctly characterizes the plaintiffs' concept of the nature of this action, but denies that this concept is valid.

2. The defendant admits that the plaintiffs are citizens of the United States, that their claims exceed \$10,000, and that they base their claims on the statutes and legal theories specifically set forth in paragraph 2 of the petition, but the defendant denies the applicability to this case of those statutes, or the soundness of those legal theories. The last sentence of paragraph 2 of the petition is a conclusion of law to which no response is required.

3. The defendant denies the allegation of the first sentence of paragraph 3 of the petition that there was a "seizure, use and occupation of plaintiffs' real property" by the defendant during the Panamanian riots of 1964. Except for the words "relating to the Army's appropriation and use of plaintiffs' property," the defendant admits the allegations of the second sentence of paragraph 3 of the petition, and the allegations of the third sentence of that paragraph.

4. The defendant admits the allegations of paragraphs 4 through 21 of the petition.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the petition.

6. The defendant admits the allegation of the first sentence of paragraph 23 of the petition that the large glass windows on the ground floor of the Masonic Temple, which windows were broken by rioting mobs in the Canal Zone, were replaced by the Government, at no charge to the Temple, first by cinderblocks and later by translucent glass blocks, but the defendant denies that authorization for this replacement was never given by the Temple. The defendant also denies that this replacement of glass windows "sealed off" the ground floor in the Temple, in the sense that it in any way restricted or impeded the entry or exit of persons from the building. The defendant admits the last sentence of paragraph 23 of the petition.

7. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the first sentence of paragraph 24 of the petition. The defendant admits the allegation of the second sentence of paragraph 24.

8. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 25 through 27 of the petition.

9. The defendant admits that paragraphs 28 and 29 of the petition contain a correct statement of the plaintiffs' claims for damages, but has no knowledge or information upon which either to admit or deny that the amounts claimed correctly reflect the injuries suffered. In any event, the defendant denies the assertion in paragraph 28 of the petition that the "Army took over the building," and the defendant further denies that it is liable for any or all of the damages claimed by the plaintiffs, these damages having been caused not by the defendant, but by a rioting mob.

10. The defendant admits the allegations of paragraphs 30 and 31 of the petition, and of the first two sentences of paragraph 32 of the petition. The defendant further admits that the plaintiffs were not permitted to see the docu-

ment referred to in paragraph 32 of the petition, but denies that this in any way interfered with their right of appeal to the Secretary of the Army.

11. The defendant admits the allegations of paragraph 33 of the petition, except for the date therein stated, which should be August 19, 1966.

12. All of the allegations of paragraphs 34 through 38 of the petition, to the extent that they are not conclusions of law, are argumentative and do not require answer, and, consequently, are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied.

13. The defendant denies each and every allegation of the petition not specifically admitted, denied or qualified herein.

WHEREFORE, having fully answered, the defendant prays that the petition be dismissed.

Respectfully submitted,

EDWIN L. WEISL, JR.

Edwin L. Weisl, Jr.

Assistant Attorney General

MARTIN GREEN

Martin Green

*Attorney, Department of
Justice*

Attorneys for Defendant

Motion for Summary Judgment

Defendant moves for summary judgment on the following grounds:

1. The petition fails to state a claim upon which relief can be granted.
2. There is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

This motion is made on the basis of the petition filed in this case, the defendant's answer thereto, and the stipulation entered into between the plaintiffs and the defendant, and filed concurrently with this motion.

Respectfully submitted,

EDWIN L. WEISL, JR.

Edwin L. Weisl, Jr.

Assistant Attorney General

MARTIN GREEN

Martin Green

Attorney

Attorneys for Defendant

Stipulation

The parties hereto, by their respective counsel, hereby mutually agree and stipulate as follows:

1. All statements of fact contained in a 98-page document entitled "United States Presentation—Background and Chronology of the Events in Panama and the Canal Zone on the Ninth, Tenth and Subsequent Days in January 1964 for the Committee Established under the Resolution of OAS/OC, February 6, 1964" (a copy of which is attached hereto, and marked Exhibit A), shall be considered true for purposes of this litigation.

2. All statements of fact contained in a 9-page "Fact Sheet" compiled by the Office of General Counsel of the Army and attached to a letter of March 17, 1964, from Mr. Alfred B. Fitt, General Counsel to Mr. Ronald A. Jacks, attorney for the plaintiffs herein (a copy of which is attached hereto and marked Exhibit B), shall be considered true statements of fact for purposes of this litigation.

3. All statements of fact and direct testimony contained in a 115-page document entitled "Transcript of the United States Oral Presentation on February 14th and 15th, 1964 to the Committee Established under the Resolution of the OAS/OC, February 6, 1964" (a copy of which is attached hereto and marked Exhibit C), shall be considered true for the purposes of this litigation.

4. The thirty-seven photographs and seven maps contained in a document entitled "Photographs—Exhibit P" (a copy of which is attached hereto and marked Exhibit P), correctly depict what the inscriptions at the bottom of the photographs and the legends on the maps state they depict.

5. Copies of the eleven items described and included in Exhibit D attached hereto are true and correct reproductions of authentic originals.

6. The thirty-three photographs contained in Exhibit E attached hereto, correctly depict scenes and incidents described therein.

7. No party shall be deemed foreclosed from objecting either to the facts or the documents on the ground of irrelevancy or immateriality and both plaintiffs and defendant shall be free to offer such additional evidence as may appear proper, except for the purpose of contradicting the facts stipulated or impeaching the authenticity of the documents and photographs above described.

RONALD A. JACKS

Ronald A. Jacks

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Washington, D. C. 20006

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EDWIN L. WEISL, JR.

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Attorneys for Defendant

EXHIBIT A**United States Presentation**

**Background and Chronology of the Events in Panama
and the Canal Zone on the Ninth, Tenth, and Subsequent
Days in January 1964 for the Committee Established
Under the Resolution of the OAS/OC,
February 6, 1964**

Introduction

This is a presentation of the events which began on January 9, 1964, in Panama and the Canal Zone. It is based on exhaustive analyses of eye-witness accounts, contemporaneous statements, and relevant documents. In an effort to provide the Committee with a complete view of the events, photographs, maps, and other materials are included.

Part I is a detailed chronology of the flag incident at the Balboa High School and the massive mob violence and persistent sniper attacks that followed. Canal Zone officials had reason to believe that the flag issue could be resolved by persuasion and forbearance and without the use of force. However, an unannounced march to Balboa High School by some 200 Panamanian students, undertaken for the purpose of displaying the Panamanian flag, resulted in an explosive confrontation that set the stage for the tragic events which followed.

Owing to the skill and restraint of Canal Zone police and school officials, the departure of the demonstrators from the Zone was without any physical clash with the U.S. students. The Panamanian students were frustrated and angry at the failure of their mission. Yet it seems likely that the violence which followed could have been avoided if Panamanian authorities had responded promptly to the notification by Canal Zone officials that the students would soon be leaving the Zone, and to the request for assistance

in handling the students on their return to the boundary between Panama and the Canal Zone.

In the absence of such preventive action, the students' fury became the spark for mass incursions into the Canal Zone by Panamanian rioters at numerous points along an extended border. The mobs attacked and killed U.S. and Panamanian citizens and burned and looted their properties. A maximum effort by the Canal Zone Police force was required to prevent the mobs from reaching U.S. residential areas. The number and force of mob attacks upon persons and property in the Zone exceeded the capacity of the police to contain them, and at 8:00 p.m. on January 9th, the Commander of the Armed Forces in the Canal Zone assumed responsibility for law and order in the Canal Zone.

For two and one-half days mobs made repeated attempts to penetrate deeply into the Zone. In Panama, buildings and automobiles were burned and looted. Unguarded citizens were attacked. For three and one-half days scores of snipers—some of them armed with automatic weapons—were active against U.S. personnel in the Tivoli Guest House in Balboa, in the Masonic Temple in Cristobal, and in adjacent areas. It was not until January 16th that it became possible to return responsibility for the maintenance of civil order in the Canal Zone to the Governor of the Zone.

During this period when lives and property within the Canal Zone were under violent attack, the response of United States police and military forces was extraordinarily restrained. Events in Colon are illustrative. There, the United States military commander did not approve the use of riot control shotguns until murderous sniper fire, continuing for almost 36 hours, had taken three American lives and wounded 12 more. Tear gas was the standard weapon for control of the mobs. No machine guns or other automatic weapons, tanks, or aircraft were ever used by United States personnel during the riots.

Throughout the period of rioting repeated attempts, through various authorized channels, to secure the cooperation and assistance of the Panamanian authorities in preventing violence or restoring order produced no effective action. Only on early Monday morning, January 13th, did the National Guard move with force. When it did, order was promptly established in both Colon and Panama City and sniper fire ceased.

Throughout this period, by use of public information media, by haranguing the crowds, by organizing demonstrations, and by well-equipped and organized sniper fire, leftist extremist elements sought to stimulate and maintain violent attacks on U.S. property and lives.

By the end of the riots, five had died in the Canal Zone. There were over 200 United States casualties.

Part II of this presentation discusses the size and capabilities of the civilian security forces of both the Canal Zone and Panama. Read in light of factual background, it underscores the tragedy of the Panamanian Government's failure to support Canal Zone civilian authorities in stemming the violence.

Part III sets forth numerous examples of the effort of the Panamanian news media to incite the Panamanian public to mob action.

Part IV offers some evidence of professional, extreme leftist agitation to intensify and prolong the mob violence.

Part V sets forth the toll in lives and property that resulted from the events of January 9th, 10th and subsequent days.

Finally, Part VI details some of the extensive damage to the property of United States citizens and threats to their lives in areas in Panama far from the Canal Zone border.

The picture presented is not a pleasant one. The United States found itself faced not only with rioting mobs within

the Canal Zone and with snipers killing and wounding its citizens, but also with the extraordinary charge that the United States was an aggressor in this affair.

These events having been investigated, it is the firm hope of the United States that both countries can move forward toward the re-establishment of a sound and friendly relationship.

Part I—Chronology of Events

This part of the report is a statement of the background and events related to the flag incident at Balboa High School, the demonstrations of Panamanian students in their march through the Canal Zone on the afternoon of January 9, 1964 and the extensive rioting and violence in the Canal Zone and Panama by residents of Panama that commenced before the students had returned.

The account begins with the initial raising of the Panamanian flag alongside the United States flag in Ancon, Canal Zone, on September 21, 1960 and extends through the period of rioting and violence that commenced January 9, 1964.

1. *Background of the Flag Incidents.*

The flying of the Panamanian flag in the Canal Zone has been a subject of discussion between the United States and the Republic of Panama for a number of years. For purposes of this report it is sufficient to begin with the year 1960 when the Panamanian flag first was flown in the Canal Zone on a daily basis alongside the United States flag.

President Eisenhower, on September 17, 1960 directed that the flag of the Republic of Panama be flown regularly at a single location as a unilateral act on the part of the United States Government in recognition of Panama's titular sovereignty over the area. On September 21, 1960 the two flags were raised in Ancon, Canal Zone, at Shaler

Plaza near the Republic of Panama boundary, and, except for a short time during the recent disturbances, they have flown there continuously.

The Government of Panama continued to urge that its flag be raised at additional locations in the Zone, and this aspiration was a subject of discussions between the Presidents of the two countries when President Chiari of Panama visited Washington, D. C. in 1962.

On June 13, 1962 Presidents John F. Kennedy of the United States and Roberto F. Chiari of Panama issued a joint communique stating that they were appointing high level representatives to discuss points of dissatisfaction between the two nations. Ambassador Joseph S. Farland and Governor Robert J. Fleming, Jr. were appointed by President Kennedy and Foreign Minister Galileo Solis and Dr. Octavio Fabrega were appointed by President Chiari.

The communique stated, in part, that the Presidents had "agreed that their representatives will arrange for the flying of Panamanian flags in an appropriate way in the Canal Zone."

The flag question was the first substantive matter discussed by the Special Commission. Governor Fleming with the concurrence of Ambassador Farland developed a list of 15 sites at which the United States and Panamanian flags would fly together in the Canal Zone, including Shaler Plaza where, as already noted, the two flags had been flying since September 21, 1960. The list of locations for the dual flags was presented to Panama at a meeting of the Commission on July 20, 1962. This original list of sites did not include any schools. Panama did not suggest any additions or deletions, and did not raise any question about the schools.

When the new Thatcher Ferry Bridge across the Panama Canal was dedicated on October 12, 1962, United States and Panamanian flags were flown at each end of the center span. These flags have flown 24 hours a day ever since.

On October 29, 1962, in further implementation of the agreement, dual flags were raised on twin poles before the Administration Building at Balboa Heights, and on November 1, 1962, at the Administration Building at Cristobal. This followed public announcement of the agreement on flags by President Chiari in an address to the Panamanian National Assembly on October 1, 1962.

On January 10, 1963, the Special Commission issued a statement reading in pertinent part as follows:

"It has been agreed that the flag of the Republic of Panama will be flown together with the flag of the United States of America on land in the Canal Zone where the flag of the United States of America is flown by civilian authorities. Private organizations and persons in the Zone are free to display flags at will over their places of residence or business. Other aspects of the flag question will be discussed later."

During the first nine months of 1963 no action was taken to raise additional Panamanian flags because a suit had been brought in the United States District Court in the Canal Zone for an injunction to prohibit the flying of dual flags. This suit was dismissed on July 8th; on September 27th the time for appeal expired without an appeal having been filed.

Thereafter, the Governor directed that the dual flags be flown at the remaining selected sites. This was carried out in accordance with a schedule which would permit completion of the installation of all poles by February 7, 1964. As each set of poles was erected, the two flags were immediately raised at the following locations:

Canal Locks at Miraflores	October 24, 1963
Canal Lock at Gatun	November 9, 1963
Coco Solo Hospital	November 15, 1963
Corozal Hospital	November 30, 1963
Palo Seco Leprosarium	December 4, 1963
Town of Margarita	December 18, 1963

In the meantime the list of 15 locations for the two flags was increased to 17 by reason of the Governor's addition of sites at two cemeteries, which had been mentioned but not specifically included at the time of the original list. In November 1963 the Governor also gave consideration to dual flags at the four high schools. The question was discussed informally with leaders of the Canal Zone Civic Council and with senior officials of the Panama Canal Company and Canal Zone Government. It became apparent that the issue of displaying the two flags at the schools was an extremely emotional one.

It was the consensus that such a display might cause friction between national groups at the schools. This position was consistent with the informal opinion received from school officials in 1962 when the question of flag sites was first considered. The Governor therefore decided that the list of 17 locations should not be further increased.

On December 30, 1963 the following press release was issued by the Governor:

"On and after January 2, 1964 the Panamanian flag will be flown together with the flag of the United States in civilian land areas in the Canal Zone where the United States flag is flown by civilian authorities.

"This action implements the understanding made public in a joint communique issued by the two Governments earlier this year which stated that 'the flag of the Republic of Panama will be flown together with the flag of the United States of America on land in the Canal Zone where the flag of the United States of America is flown by civilian authorities. Private organizations and persons in the Zone are free to display flags at will over their places of residence or business.'

"For some time the Panama Canal has been erecting dual flagpoles at selected sites. Work has been com-

pleted and the two flags are now flying at 11 of the sites. Dual flagpoles will be erected at five additional sites between now and the early part of February. One further location at which the two flags will fly will be the new Gorgas Hospital addition when it is completed later this year.

"The 11 locations where the two flags are now flying are Shaler Plaza, Thatcher Ferry Bridge, the Administration Building in Balboa and also at Cristobal, Miraflores and Gatun Locks, Coco Solo and Corozal Hospitals, Palo Seco, Margarita and Coco Solo. The five remaining locations in addition to the new Gorgas Hospital addition are Gamboa-Santa Cruz, Rainbow City, Paraiso, Mount Hope Cemetery and Corozal Cemetery. Locations at which the United States flag has currently been flown alone and at which no flags will be flown on or after January 2, 1964, are the schools; the Ancon District Court Building; the Industrial Division, Cristobal; a site in Gamboa which will be replaced by the site for the two flags; and the present Gorgas Hospital.

"In accordance with law and customs requiring the United States flag to be displayed in or near schools, the United States flag will continue to be displayed in classrooms or elsewhere within the schools as at present. The Panamanian flag will continue to be displayed with the U.S. flag in all Latin American schools and in certain other schools as appropriate, following present practice."

2. Flag Incidents at Balboa High School.

Schools reopened on Thursday, January 2, 1964 after the Christmas holiday. During the first few days of the new school period students at Balboa High School began to protest the discontinuance of the flying of the United States flag outside the school. On Friday, January 3d, a

petition to President Johnson protesting the absence of the flag was circulated at the school and signed by 400 to 500 students. On the same day notice was taken of the matter in radio commentary from Panama. On a regular program, called *El Socialista* (Ex. B, p. 1), it was stated that the "invaders" of Panamanian territory had decided to mock Panama by eliminating the United States flag from every possible site instead of putting up a staff for the Panamanian flag to fly alongside it. This was described as a systematic refusal to recognize Panamanian rights.

In the newspaper *El Dia* on January 7th (Ex. C, p. 12), Celso Solano, former secretary-general of the now outlawed Partido del Pueblo, referred to "aggressions" which the Canal Zone continued to make against the flag and the country of Panama. He said the act of eliminating flagpoles was to evade the obligation of flying the flag of Panama alongside that of the United States and was a crude, offensive and dangerous trick.

At about 6:00 a.m. on Tuesday, January 7th, two Canal Zone policemen were sent to Balboa High School because school officials had learned that the students planned to raise the United States flag that morning. The police had orders to maintain order and prevent any damage to Government property. By 6:40 a.m. about 25 students had arrived and the number grew quickly. The students found the halyards locked so they made several unsuccessful attempts to climb the pole. The number of people grew until 200 to 300 students and about a dozen adults were present. The majority were calmly observing the group of approximately 80 students around the base of the pole. The students finally loosed the halyards and raised the flag at 7:25 a.m. After the flag was raised, the students reported to their classes which started at 7:45 a.m. Attendance was normal. A few adults and students remained in the area across the street from the school.

Shortly after the flag was raised, the Civil Affairs Director of the Canal Zone Government, B. I. Everson, and the Acting Superintendent of Schools, Frank Castles, came to Balboa High School. These United States Government officials and the principal of the school, David Speir, lowered the United States flag at 8:20 a.m. and took it to the principal's office.

When the first class period ended at 8:38 a.m., a group of students again gathered around the flagpole. They proceeded to raise another small flag on the pole. About 150 students were then on the school steps or lawn and they recited the pledge of allegiance to the flag. A number of adults were in the area and the school officials were present. No effort was made to prevent the students' action because the Governor did not wish to have an incident involving use of force to prevent United States students from raising the United States flag outside their school building and pledging allegiance to it. It was believed that the problem could be satisfactorily resolved in some way such as flying both flags.

During the morning a small group of students and adults kept watch near the school grounds. At noon the students substituted a larger flag on the pole. After classes ended at 2:45 p.m. about 100 students and adults remained in the area until evening to prevent removal of the flag or pole. At 6:05 p.m. the flag was lowered by six high school boys. About 25 students remained on watch all night and were furnished food and blankets by other persons.

On January 8th, radio station Miramar in Panama reported that there was great emotion in the dispute between Panama and the Canal Zone and predicted that differences between students in the two jurisdictions would become worse (Ex. B, p. 2). On the same day a newspaper columnist wrote in *El Dia* that the Canal Zone authorities were tricking the Panamanians out of the right to fly their

flag in the Canal Zone by eliminating flying the United States flag (Ex. C, p. 13).

At 7:45 a.m. on Wednesday the flag was again raised by the students. The situation remained about the same and a small group of adults and students, some from the Canal Zone College, remained all day across the street from the high school.

After school closed Wednesday afternoon, about 200 students walked around the flagpole and on the school grounds with placards and signs stating their desire to keep the United States flag flying in front of Balboa High School. During the day United States flags had also been raised at the high school in the town of Coco Solo at the Atlantic end of the Canal Zone and at various elementary schools. This was done by groups of high school students that were accompanied by parents or other adults in some cases.

Also on January 8th, the Governor, concerned about the situation, issued a statement appealing to the Canal Zone public for cooperation. He reviewed the background of the dual flag program and said:

"I believe that it is unnecessary for me to dwell at length on the responsibilities of U. S. citizens to abide by the official commitments of their government. I would, however, like to emphasize that we have a particular responsibility here in the Canal Zone where our actions are subject to direct view by citizens of other countries.

"I request the cooperation of all U.S. citizens at this time in honoring our country's commitments and in showing our good faith by our own actions. We must set the example and some recent actions have not been good in view of an international commitment of the United States.

"At the same time, I will say that the list of official locations at which the two flags are to be flown is not final and absolute. Should the various communities desire dual flag displays at other locations, it is possible that we can make appropriate additions in consonance with our international commitment. In this regard, I would look to the Civic Councils for advice as to the wishes of the communities."

The next morning, Thursday, January 9th, the Governor prepared another statement reviewing the discussions with Panama and explaining the nature of the commitment by the United States to discontinue the display of the United States flag unless flown with the flag of Panama. In part, his remarks read as follows:

"... the flag agreement is a valid commitment of our government. We Americans in the Zone have an obligation as citizens to support that commitment regardless of our personal beliefs. I hope that we Americans will conduct ourselves with reason, and in an emotional situation successfully avoid emotionalism."

This statement by the Governor was broadcast at 6:15 p.m. as scheduled.

The Panamanian press and radio stations on January 9th continued to feature news stories about the situation at Balboa High School that were either false or misleading and were apparently calculated to arouse emotions against the United States and against the United States students in particular. (Ex. B, pp. 2, 3, 4; Ex. C, p. 15)

3. Panamanian Student March to Balboa High School.

At about 4:40 p.m. on Thursday, January 9th, a group of Panamanian students entered the Canal Zone on 4th of July Avenue in the town of Ancon for a march to Balboa

High School (Ex. P-M1, P-M2). Their march was unannounced and unexpected insofar as Canal Zone authorities were concerned.

About 200 persons, most of whom appeared to be boys and girls in uniforms of the Panamanian High School, Instituto Nacional, moved along Gorgas Road marching in a column of several persons abreast. They carried small Panamanian flags, a single large Panamanian flag of a silken material bearing the shield and the name of the Instituto Nacional in its center, and the banner of the school's Student Federation. They also carried a number of provocative signs and placards of various sizes bearing slogans such as the following:

PANAMA IS SOVEREIGN IN THE CANAL ZONE

FLEMING GO HOME

**PANAMA IS NOT A PROTECTORATE, IT IS
FREE AND SOVEREIGN**

THE PANAMANIAN FLAG ONLY

(See Ex. P-1).

The marchers headed for Balboa High School by Gorgas Road, a route that took them around Ancon Hill, past Gorgas Hospital, past the residences of Governor Fleming and of some employees of the Canal agencies, to the site of the Canal Zone Administration Building, a total distance of about one mile. At the Governor's residence they paused and sang the national anthem of Panama (Ex. P-2), then continued their march. Some chanted "Gringo Go Home!" They proceeded around one side of the Administration Building, down a long flight of more than 100 steps, and past the Goethals Memorial to an area near the fire station, which is a short distance from, and within sight of, the Balboa High School. In descending the long flight of steps, the students passed between the

twin flagpoles in front of the Administration Building from which were flying the flags of both Panama and the United States (Ex. P-3).

The Panamanian students were stopped by a squad of about 12 Canal Zone police officers on instructions from Acting Governor David S. Parker so that Police Captain Gaddis Wall could talk to them. The police had been directed to refrain from the use of force in anticipation that the students would remain orderly and cooperative.

Captain Wall, the district police commander at Balboa, talked with members of the group where it had been halted by the police. He spoke through an interpreter fluent in Spanish (Ex. P-4). He was joined by Balboa High School principal, David Speir, and school division official, Frank Castles. At this time the spokesman for the students, Guillermo Guevara Paz, was talking to Captain Wall. Mr. Speir was informed that a delegation of the Panama students wanted to talk to the Balboa High School students. He suggested that the school library would be the most suitable place, and he walked at once the short distance to the high school where he instructed the Canal Zone students to move into the library located on the second floor of the high school building. He emphasized the importance of showing every courtesy to the Panamanian delegation that wished to speak to them. Most of the Canal Zone students present went into the building and upstairs to the library. In the meantime, more people (both adults and children) were gathering on the school lawn.

The delegation from the Panamanian students did not, however, come to the high school. Rather, they informed Captain Wall that they wished to go to the Balboa High School flagpole for the purpose of raising the Panamanian flag from the National Institute which they were carrying. They wished to put it on the pole with the United States flag, which was flying at the time, and to sing their national anthem.

After some discussion with the students, Captain Wall proposed that a small group be escorted to the flagpole in front of the Balboa High School, where they could sing the national anthem and display their flag, after which they would be expected to remove the flag and return peaceably to Panama.

A student who addressed Captain Wall in English said there were about 14 radicals in the Instituto Nacional group who were not in accord with this plan but that he would try to persuade them to accept this agreement. After discussion among the Panamanian students, and despite some loud objections from some of them led by an adult Panamanian, Captain Wall's proposal was accepted. (During the discussions with the student spokesmen, Captain Wall and the other policemen were being insulted and vilified continuously by individual students in the crowd.)

While the small group was being formed to march to the high school flagpole, a number of the Canal Zone police noticed that the large Panamanian flag of the Instituto had a split at the top extending downward a few inches. At least one of the Panamanian students called attention to the split, and a Canal Zone policeman offered the use of a small medal he was wearing as a pin to close the opening temporarily. The offer was declined. According to a published report attributed to one of the students from the Instituto Nacional, the flag had been used in student movements in 1947, 1958, and 1959. Official photographs taken before the student delegation moved to the high school flagpole show a tear (Ex. P-5).

Toward the Flagpole

Six of the Panamanian students left the main group and were escorted by the police to the Balboa High School lawn near the flagpole (Ex. P-6). Four of them carried the flag, holding it by its top edge in front of them. One of the flag carriers grasped both edges of the split in one

hand, keeping it closed (Ex. P-7). Of the other two students in the delegation, one carried the Student Federation banner on its staff, and the other held a placard reading: "Panama is Sovereign in the Canal Zone." During the walk the lower fringe of the Panamanian flag touched the ground and was stepped on several times by the Panamanian students. A Canal Zone police officer cautioned them, "Pick up your flag," but the students did not indicate that they understood.

On the high school lawn there was a large group of people (presumably United States citizens for the most part) including men, women, and children of all ages. Mr. Speir explained to them what the Panamanian student delegation planned to do and emphasized the importance of maintaining a courteous and dignified atmosphere. As the delegation approached, about 30 Balboa High School students seated themselves upon the steps around the base of the flagpole and refused to move when requested to do so by Captain Wall. There was silence until adults started chanting, "No, no, no." This chanting was picked up by the Balboa High School students.

In the vicinity of the flagpole the Panama students posed with their flag and banner while a photographer took pictures of them. Captain Wall and the high school principal cautioned the delegation to carry out their ceremony peacefully. At this point the students stated that their real intention was to raise their flag on the flagpole. Captain Wall pointed out that there was only one flagpole and that the United States flag was already flying there. The Panamanians insisted that they raise their flag. They suggested that the United States flag be lowered and their flag be attached to the same place as the United States flag and that the two flags be raised simultaneously.

About this time the United States citizens began singing the United States National Anthem. This appeared to increase the resentment of the Panamanian students, and

they stated harshly that, if they could not hoist their flag, they would not continue with the ceremony (Ex. P-8). The United States officials attempted to reason further with the Panamanians, but the delegates' anger increased. One of them ran back to the waiting crowd across the street, apparently to consult with them. He returned in a few minutes and announced that they were not going to have the ceremony. After further attempts at reasoning with the Panamanians proved futile, Captain Wall feared that violence would inevitably result from the continued confrontation of the United States citizens and Panamanians. He, therefore, announced that the ceremony was cancelled and told the Panamanian students that they would have to leave.

Panamanian Students Moved Back

The Panamanian students refused to leave, whereupon Captain Wall directed the uniformed policemen to move them and their banners back to join the rest of the Institute students across the street. The flag bearers refused to leave the area, and the police officers moved them back across the street by walking against them with the police riot sticks held horizontally at chest height. As the delegation was moved back out of the school area, an adult (believed to be a United States citizen) attempted to seize the staff of the Panamanian school banner being carried by one of the students, but he was intercepted and removed from the group by Canal Zone police. During the movement of the delegation back to the fire station, the Panamanian flag was not torn by any of the United States citizens and it remained in the hands of the Panamanian students as they resisted the slowly-moving line of policemen.

As the Panamanian students were leaving the immediate area of the flagpole, a United States schoolgirl fell to the ground. A United States student, thinking that a Pana-

manian had pushed the girl, raised his hands toward the Panamanian he believed to be responsible, but he was shoved away by a policeman before he could strike the other boy. A photograph of this incident was published a few days later in *The Panama American*, a Panama City daily newspaper, together with text asserting that the United States student had been tearing at the Panamanian flag (Ex. P-9, P-10).

During these activities near the flagpole, the majority of the Panamanian students across the street were orderly and quiet, but in the center of the group there were 15 or 20 older students who were yelling and waving their arms.

Captain Wall and Principal Speir both said that, based on their personal observations, no Canal Zone policeman tore or ripped the Panamanian flag. They observed that a tight cordon of police surrounded the Panamanian student delegation and separated it from the United States students. They concluded that the four Panamanian students holding the flag tore it themselves during the scuffle.

In the confusion at the flagpole, two of the four Panamanian flag bearers stumbled but held tightly to the flag, which appeared to give under the stress and parted along a seam (Ex. P-11). When the two students regained their footing, still holding the flag, a Canal Zone policeman noticed that the flag was ripped from the top down the middle almost to the top of the coat of arms emblem (Ex. P-12). On seeing that their flag was torn, one of the Panamanian flag bearers said, in Spanish: "Now you caused us to tear our flag."

When they reached their companions, the delegates held up the flag and stated: "Look what they did to our flag!" A roar went up from the main body of Panamanian students, and the student agitators commenced shouting loudly and surging against the police line. Within the group there was noisy agitation and some stones were thrown, one of

which struck a policeman in the forehead, piercing his helmet liner.

Hoping to get the Panamanian students out of the Canal Zone without incident, Canal Zone officials had arranged for some Government busses to be sent to the vicinity of Balboa High School, to stand by and provide transportation to Panama City for the Panamanian students. The Panamanian students refused this transportation and began to shout: "To Panama, to Panama! To the University, to the University!" This was about 6:30 p.m. These events at the high school had lasted more than an hour. The Panamanians leaving the school broke into two groups, one walking on Gorgona Road toward the Balboa Heights railroad station while a larger group began running up the steps leading to the Canal Zone Administration Building. There were shouts of "Let's take down their flag!" A number of Canal Zone policemen climbing the building stairs behind the students were targets for stones. Some of the students shouted insults and obscenities at the Canal Zone employees.

Some of the Panamanian students tried to haul down the United States flag but were stopped by Canal employees.

Members of a Panamanian group led by adults shouted in English to the effect: "You will die for this; you will live to regret it."

Rioting Begins

The Panamanian students then commenced deliberate damage to property.

The students broke a number of Administration Building windows. They stoned automobiles. They surrounded an automobile being driven down the Heights Road hill by a U.S.-citizen woman employee of the Panama Canal. They beat on the car and shouted in Spanish: "Kill her! Kill her! The Gringa is very bad!" They shook the car, caus-

ing the driver to fear the vehicle would be overturned. The woman finally escaped and drove to Balboa where she suffered a nervous collapse.

The students were now an unruly crowd running and milling in and out of the street. They continued along Heights Road and Gorgas Road breaking street lights and automobile windows with stones, and overturning large trash cans on the way.

Units of the Canal Zone police followed slowly in automobiles and on foot a short distance behind. They were under orders of the Acting Governor not to arrest the Panamanian students for damaging property as long as the group continued to move toward the Panama City boundary.

As the students passed Gorgas Hospital, several of them threw stones at the patients' windows. On passing the new section of Gorgas Hospital that was under construction, the Panamanian students tore down a large section of scaffolding on the outside of the building and threw it into the street, making a barrier that had to be removed before the following police cars could pass. Some of the rioters entered the partially-completed building, climbed to the upper floors, and threw down building materials including pieces of lumber and bags of cement. The students then stoned and broke windows in the office of the Treasurer of the Panama Canal Company, farther down Gorgas Road. They knocked down and kicked a United States pedestrian. The violence of the students increased as they neared the Panama boundary (Exs. P-M1, P-M2).

4. Requests for Support from Panamanian Authorities.

Before the students reached the "J" Street intersection on their way back to the Instituto Nacional it became apparent that strong support from the Panamanian Government and the use of the Panama National Guard in the

adjacent areas of Panama would be essential if order were to be restored.

Between 6:30 p.m. and 8:00 p.m. eight calls were made for National Guard support: (1) At 6:38 p.m. the Canal Zone Police Chief directed a call to Major Urrutia, Third Commander of the Panama National Guard; (2) the police station radio dispatcher called Major Urrutia three times; (3) Captain Wall twice directed calls for assistance; (4) a representative went to Headquarters and talked to the Commander, Colonel Bolivar Vallarino at 7:22 p.m.; (5) at 8:00 p.m. Panama Canal Information Officer, Frank A. Baldwin, talked to Colonel Vallarino.

These calls for support from Panamanian authorities were made direct to the National Guard in accordance with established procedures. Although support was promised, it was not sent.

Attempts to obtain assistance from the Government of Panama were also made through diplomatic channels and, finally, at the highest level in the Republic.

At 6:55 p.m. the Acting Governor of the Canal Zone telephoned the United States Embassy in Panama. In the absence of the Chargé d'Affaires, the Acting Governor, Colonel Parker, talked to the Staff Duty Officer, explaining the situation. The Acting Governor asked that a protest be made immediately to Panama President Chiari that Panamanian students had caused considerable damage in the Canal Zone through their actions, and that it was hoped to get cooperation from the National Guard in handling the students as they left the Zone. Between 7:40 p.m. and 8:15 p.m. the United States Chargé d'Affaires contacted both President Chiari and National Guard Commander Vallarino to urge the Guard's assistance in dispersal of the rioting mobs in Panama along the Canal Zone border.

At 8:45 p.m. Acting Governor Parker telephoned President Chiari personally. He told the Panamanian President

about the situation as it was then developing, adding that the Zone forces had done everything possible to avoid using force, that they had attempted solely to preserve public order and protect life and property. He told the President that it was an extremely serious situation with buildings and cars being set on fire and mobs threatening the Canal Zone housing areas and the Tivoli Guest House. Colonel Parker stated that, due to his inability to maintain law and order within the Canal Zone with police forces alone, there had been no choice but to call on General Andrew P. O'Meara, Commander in Chief, United States Southern Command, to ask him to restore order with military forces.

5. Commencement and Spread of Violence.

The Canal Zone-Panama City boundary extends along a curving line from the Panama Railroad Freight House on the north, past the Tivoli Guest House, south past the Ancon School, then southwesterly past the Instituto Nacional (in Panama) and the District Judge's residence, to the approaches of the Thatcher Ferry Bridge, a distance of a little less than two miles (Exs. P-M1, P-M2).

As of 4:40 p.m. when the Panamanian students began their march to Balboa High School there were 20 policemen on duty in the Pacific district of the Canal Zone. By 8:00 p.m. the uniformed force on duty had been increased to its total available force of 81 men. One additional man reported at 9:00 p.m., bringing the total to 82. The force was continued at that level until the early morning hours of January 10th.

At 6:35 p.m. (prior to the return of the Panamanian students from Balboa) a group of men turned over a small car on 4th of July Avenue opposite the Instituto Nacional and about 50 to 75 yards to the east of the Canal Zone residence of the United States District Judge. The same

men then took a second car from the curb, rolled it out and set fire to it. These men were older than students and were not dressed in student uniforms. The crowd moved in the direction of the Gorgas—"J" Street intersection and then came running back to the area in front of the Instituto. Some began to throw stones over the fence at the home of the District Judge.

The disturbances then spread in both directions along the boundary. On the basis of police reports being received at the Canal Zone Administration Building, Acting Governor Parker called the Staff Duty Officer at United States Southern Command at 6:50 p.m. and suggested that troops be alerted. At 7:18 p.m. Acting Governor Parker again called the Staff Duty Officer and stated that the situation was under control at the moment and that he saw no necessity for moving troops. He added that the situation might change at any moment. Acting Governor Parker again called the duty officer at the U.S. Southern Command at 7:25 p.m. and reported the situation was becoming more serious and there was every indication that military assistance would be required.

At 7:45 p.m. the Acting Governor, accompanied by three other Canal Zone Government officials, made a reconnaissance of the border in the vicinity of the Tivoli Guest House. By that time a crowd estimated at about 3,000 was along Kennedy Avenue. Canal Zone police were having great difficulty containing the crowd which had penetrated well into the Canal Zone at a number of places, and it was apparent that life and property in the Canal Zone were in serious jeopardy. No National Guard personnel were in sight.

By this time rioters had already wrecked and burned the facilities in the Canal Zone Bus Service terminal near Shaler Plaza, had torn down sections of the cyclone fence

along 4th of July Avenue running northeast from Judge Crowe's house and attacked the residence of the U.S. District Judge with rocks and Molotov cocktails, had started fires with Molotov cocktails in the freight house and the laundry in Ancon, had ignited a Panama Railroad coach at the Ancon station, and had burned numerous cars at various locations within the Canal Zone, including Culebra Road, 4th of July Avenue, Frangipani Crossing, and the vicinity of the freight house.

At 7:59 p.m. Acting Governor Parker reported in person to General Andrew P. O'Meara, Commander in Chief, United States Southern Command, that he was unable to maintain law and order in the Canal Zone with only the police and civilian authorities. Acting Governor Parker requested that General O'Meara assume command of the Canal Zone.

General O'Meara immediately directed the Commander of the U.S. Army Forces Southern Command to clear the Pacific area of the Canal Zone of demonstrators and to safeguard the borders of the Canal Zone in that area against further disorders. He also directed that the troops in the Atlantic area be placed on a 20-minute alert. Use of tear gas was authorized to prevent mob disorders in the Zone, but use of firearms was not authorized. At 8:30 p.m. the following proclamation by General O'Meara was announced over radio and television:

"Upon the request of the Acting Governor of the Canal Zone I have assumed command of the Canal Zone. All persons not working or living, or attending school in the Canal Zone are directed to leave the Canal Zone immediately. All residents of the Canal Zone not engaged in official duties will return to their place of residence and remain there until further orders. Upon return to a normal situation, announcement will be made over the Southern Command Network"

Immediately thereafter an announcement enjoining residents on both sides of the border to return to their homes was repeated in Spanish and English over a loudspeaker from a small plane. The pilot was under orders to fly over the Zone only and as far as is known the plane never entered Panamanian airspace.

In the course of the next few hours, mobs attempted unsuccessfully to assault the Tivoli Guest House, Ancon Laundry, the freight terminal and loading platform. Rioters also burned and sacked the Pan American Building, and broke windows and looted shops on Kennedy Avenue in Panama City.

By 8:00 p.m. demonstrations had already begun in Colon, Republic of Panama, a distance of 50 miles away on the Atlantic side of the Isthmus. About 9:15 p.m. a crowd of approximately 1,500 came into Cristobal, Canal Zone. The mob proceeded down Roosevelt Avenue to the Cristobal Administration Building where they were allowed to raise the Panamanian flag, without interference from Zone Authorities. The crowd then returned to Colon after breaking windows of buildings and railway coaches along their route. Violence substantially increased as the crowd broke into a large Panama Canal Company Office and Storage Building to loot and destroy its contents. The mobs also broke windows of the Masonic Temple and elsewhere in the area. They then forced an entry into the Cristobal Y.M.C.A. and looted and wrecked the interior of the building.

U.S. Army troops arrived in the Cristobal area at 10:15 p.m. Looters were in the Masonic Temple and Panama Canal Company Office and Storage Building. Troops using riot control formations expelled the looters from these buildings. By 11:30 p.m. the rioters had been cleared from this part of the Cristobal area by the troops.

Armored Personnel Carriers were erroneously identified as tanks by the Panamanians. These vehicles are designed only for transporting about twelve soldiers each. During the riots, some carriers were used on the Pacific side for transporting troops; however, as soon as this was accomplished the carriers were withdrawn well to the rear of the border. Only a machine gun is mounted on an Armored Personnel Carrier. No machine guns were employed by United States troops during the riots, and in fact no machine gun ammunition of any kind was issued.

A detailed account of the major incidents of violence and disorder along the border at both sides of the Isthmus on January 9th and subsequent days is presented in the following sections of this part of the report.

6. Rioting near District Judge's Residence, January 9th.

By about 9:30 p.m. the Panamanian mob, with the use of wire-cutting tools, had taken down the cyclone fence on the Canal Zone side of 4th of July Avenue which runs from "J" Street to a point beyond the Judge's house (Ex. P-16). They were throwing Molotov cocktails against the house. The Judge, with the aid of several Canal Zone policemen, put out the resulting fires, despite a barrage of rocks. A second attack with fire bombs set three new fires, two of which were put out. The third could not be reached because of the fusillade of rocks thrown by the mob. A Canal Zone fire rig arrived, but also was prevented from approaching, due to the rock-throwing. At this point police reinforcement arrived with two shotguns. The officers fired several shots with their weapons into the air and into the ground, and the mob retreated across 4th of July Avenue into Panama. The firemen thereupon put out the last fire.

The mob then pulled several automobiles into the Canal Zone from "H" Street in Panama City and burned them on 4th of July Avenue (Exs. P-17, P-18).

7. *Rioting Near Instituto Nacional, January 9th.*

A few blocks farther north, at the Gorgas-"J" Street intersection of 4th of July Avenue, rioting against the Canal Zone began about 6:50 p.m. with the return of the Instituto Nacional students from their demonstration at Balboa High School. Earlier a noisy crowd of adults had assembled near the Institute. When the students arrived, moving down Gorgas Road into the crowd at the intersection, they carried rocks, pieces of lumber and other missiles picked up at the Gorgas Hospital construction site and elsewhere along the way. These students, with assistance from adults in the crowd, demolished the traffic lights at the intersection (Ex. P-19) and stoned Canal Zone police who had formed a line a short distance away on Gorgas Road.

Within a few minutes the crowd had destroyed the traffic control standards and street lights in the vicinity (Ex. P-20). The students then moved in a body to the Instituto Nacional. In a few minutes they re-entered the street and violence increased.

From within the crowd several groups appeared carrying gallon bottles of gasoline. Some carried ~~smaller~~ bottles of gasoline for use as Molotov cocktails. Soon the crowd began to stone vehicles passing on 4th of July Avenue and to set parked cars on fire.

A car driven north on 4th of July Avenue by a Balboa High School girl was stopped by youths near the Instituto, along with the automobile that preceded it. The forward car, bearing a Panama license plate, was permitted to pass but the girl's car, which bore a Balboa High School sticker and a Canal Zone license plate, was attacked. The youths were heard to shout "Gringa!" and some rioters threw stones that dented the body of the car. A section of 4 x 4 timber was thrust through the rear window before the girl was able to maneuver the car into Gorgas Road out of range of the rioters (Ex. P-21). Similar incidents, involving at-

tack upon other Canal Zone licensed vehicles, occurred in rapid succession.

By 7:30 p.m. the mob, with its center at the Gorgas-"J" Street intersection had grown to at least 1,500 persons. With the street strewn with debris and burned-out cars, the rioters moved farther into the Canal Zone to attack the cyclone fence running parallel to 4th of July Avenue from Gorgas Road south. The fence was pulled and shaken until loosened from its pipe and post foundation. Shortly thereafter, three or four students came up on to Culebra Road and attempted to set fire to automobiles parked there. The Canal Zone police drove them off by firing tear gas and, in turn, were the target of rocks thrown by the crowd in the intersection below. At least one of the police injuries occurred at this point.

About 9:15 p.m. a U.S. citizen was attacked in his car by a mob on 4th of July Avenue at Domingo Diaz Street, a block from the Gorgas-"J" Street intersection. He was dragged from his car, beaten, stoned and clubbed. Officers in a Canal Zone police squad stationed on a knoll overlooking the scene were ordered to fire their revolvers in the air and on the ground in front of the mob. This caused the mob to fall back and two policemen, staying within the Canal Zone, rescued the victim. The rioters returned to burn his vehicle and turned it over to use as a barricade.

8. Rioting in Ancon Railroad Station Area, January 9th.

Shortly after 7:45 p.m., a large mob moved northward within the Canal Zone along Kennedy Avenue past Shaler Plaza to the Frangipani intersection near the railroad station and freight house. At this intersection there had been a crowd of people from early evening. At first they were relatively orderly, but then, they began attacking automobiles with stones and Molotov cocktails. One car was struck on the windshield. It burst into flames and stopped. The

passengers, a woman and two men, were dragged out and attacked with sticks, pipes, stones, and machetes. The next car with two men in it was also stopped and set on fire. The mob beat one man on the head with sticks, but the other ran and escaped. A third car was stopped and all of its windows were broken. The two male occupants were dragged out.

An automobile, with two men and one woman, was stopped at the dead-end barrier at the entrance to Frangipani Street. About 14 rioters rocked the car, overturned it, poured gasoline on it and set it on fire (Ex. P-19). Its occupants also were dragged out and beaten.

Meanwhile, a mob had arrived at the Frangipani intersection, bringing the number of rioters in the area to more than 2,000. The Canal Zone police detail in the area took up a line across Frangipani Street and adjacent areas to the sides in order to prevent the mob from overrunning the Ancon housing area, which was a short distance behind the police.

Part of the mob surged forward, throwing rocks at the police, while others broke windows in the laundry. The police fell back toward the nearby residences and then used tear gas. The crowd retreated to the laundry area and the railroad station and attempted to set fire to the laundry (Ex. P-20). They also set fire to the railroad station and some railroad coaches. When a Canal Zone fire rig arrived on the scene, firemen were stoned. Part of the mob continued to attempt to set fire to the railroad coaches with Molotov cocktails while others looted consigned freight in the railroad station.

The police by this time had exhausted their tear gas, and having no other means to protect the residents of the Ancon housing area, shot over the heads of the mob. Each of the several attempts made by the mob to force its way into the area was repelled by Canal Zone police.

gunfire directed over their heads or, when this failed, into the ground in front of them.

A segment of the mob tried to flank the police line by moving past the laundry along Roosevelt Avenue toward the Ancon Little Theater, where a play rehearsal was in progress. The four policemen present had used all their tear gas in attempting to stop the rioters. As a last resort, one of them drove the rioters back toward Frangipani by firing over their heads several times with his shotgun.

Part of the mob turned its attention to the freight house. Several rioters attempted to climb the wire fence. Molotov cocktails were tossed against the freight house and onto the loading platform. Shots were fired over the rioters' heads to drive them back while a fire sergeant extinguished the fires at the freight house caused by Molotov cocktails.

About ten rioters who had been throwing fire bombs into the freight yard pushed a burning automobile into the area and used it as a shield to protect themselves as they came nearer to throw more Molotov cocktails. A police officer armed with a shotgun and No. 7½ birdshot shouted at the rioters in both English and Spanish to get away, but they answered with curses and continued to push the burning car. The police officer then fired three shells over the rioters' heads, calling warnings and pausing between the shots. After the third round the men fled.

At this time a man running from "M" Street carrying a lighted Molotov cocktail took cover behind another car. The police officer called to him to leave and not to throw the fire bomb. The man did not move. The officer fired one shot over the automobile, again ordering the man to withdraw. The man crouched behind the auto. The officer fired into the concrete roadway about 25 feet short of him. Four other men walked over slowly, signaling that they were coming to help the injured man. The officer lowered the butt of the shotgun to the ground and told the four

to take the man away if he was injured. They picked the man up and, joined by a few other people from Panama, proceeded toward the crowd on National Avenue, carrying the injured man over their heads. Although a number of Molotov cocktails were thrown into the freight house area subsequently, the fires were quickly extinguished and further use of firearms was not necessary.

About 8:50 p.m. U.S. troops began progressively to relieve Canal Zone Police who were protecting the Ancon Laundry, Ancon Railroad Station, Freight Terminal and freight yard. A crowd estimated to be 2,000 in number was along Calle M in the Republic of Panama opposite the Ancon Laundry. Another crowd of about 500 was adjacent to the fence which encloses the freight terminal and freight yard. They were throwing rocks and Molotov cocktails over the fence in an attempt to set the freight terminal and loading shed on fire. Canal Zone firemen extinguished fires as they were set.

Once the troops were in position and Canal Zone Police relieved, rioting gradually subsided, although automobiles approaching from Panama City were stoned. One Canal Zone car was attacked at 10:40 p.m. as it passed the Olympic Stadium, three blocks distant from the Frangipani intersection. Its windshield was broken and glass splinters flew into the eyes of the woman passenger in the right front seat. The driver accelerated and escaped into the Canal Zone, where emergency medical attention was given the passenger.

9. Rioting in Area of Tivoli Guest House, January 9th.

At about 7:40 p.m., rioters moved from the "J" Street-4th of July Avenue intersection along President Kennedy Avenue in the direction of the Tivoli Guest House. Reinforced by about 1,000 persons who entered by side streets from Panama City, the mob proceeded along the Avenue (which is in the Canal Zone) to the Tivoli Guest House and

Legislative Palace area, smashing store windows, turning over cars, and breaking street lights.

At the same time, a large crowd came up "L" Street, which joins President Kennedy Avenue at the Pan American Building. The addition of these groups brought the total number of persons in the Tivoli Guest House area to about 3,000.

At this point, part of the mob attempted to approach the Tivoli Guest House over a low fence diagonally opposite the Pan American Building but was driven back by tear-gas fired by the Canal Zone police, whereupon the mob, remaining within the Canal Zone, moved to Shaler Plaza and the Canal Zone Bus Terminal, which they attacked (Ex. P-21). People climbed to the top of the bus terminal building, ripped the roofing loose, broke windows and doors, and set the burnable inside portions of it on fire.

During this period groups trying to make their way to the Tivoli Guest House over the fence along President Kennedy Avenue were held back by police tear gas. No ammunition was used by the police in the Tivoli Guest House area.

There were no Panamanian fire fighters or members of the National Guard in the vicinity. Earlier in the evening four Guard pickup trucks passed along President Kennedy Avenue and Shaler Road at different times, but the Guard took no action concerning the rioting and destruction of property.

At 8:35 p.m. a company of U.S. Army troops, numbering 110, transported in 2½ ton trucks, arrived at the Tivoli Guest House. Troops dismounted and deployed along the fence in front of the Tivoli Guest House. The rioters, numbering about 500, continued to throw stones and Molotov cocktails at the troops, and the Tivoli Guest House. They were finally dispersed by troops using tear gas.

Troops then secured a line along Kennedy Avenue from the Maryknoll Convent to the Tivoli Guest House and from the Tivoli Guest House to the Ancon Laundry and Freight Terminal.

At 10:30 p.m. U.S. troops in the vicinity of the Tivoli Guest House began receiving sniper fire from individuals stationed in and around the Pan American Building and the Legislative Palace in the Republic of Panama. The Chief of Staff of the U.S. Army Forces Southern Command requested permission to return fire. General O'Meara directed that fire *not* be returned. He also directed that the National Guard be asked by telephone to do something about the sniper situation in the Republic of Panama. This request was delivered by phone to the National Guard through a U.S. Army Liaison Officer, who was stationed in the National Guard headquarters.

By 10:50 p.m. sniper fire coming from the Republic of Panama had wounded one U.S. civilian and two U.S. soldiers. At this time authority was granted to use directed and controlled shotgun fire against identified snipers in the vicinity of the Legislative Palace, Republic of Panama. Shotgun fire was limited to the use of No. 4 and No. 7½ birdshot. Its purpose was to deter the snipers. The Army recognized that the distance between the U.S. troops stationed at the Tivoli Guest House and the snipers was too great to inflict fatal injuries. At this time, there were no Panamanians in the vicinity of the snipers.

At 11:15 p.m. General O'Meara telephoned the Panamanian Foreign Minister, Galileo Solis, to inform him that U.S. troops were being wounded by sniper fire coming from the Republic of Panama and that under the circumstances he had authorized the use of controlled shotgun fire against the snipers. If the National Guard could stop the snipers, however, General O'Meara said he would cause his troops to cease firing immediately. Minister Solis said that he would see that the National Guard were given

immediate orders to seize all snipers and to stop all sniper firing. Based on this commitment, General O'Meara directed shotgun firing to stop. His order was complied with immediately.

Despite the assurance of the Foreign Minister, however, between 11:15 p.m., that evening, and 12:30 a.m., the next morning, sniper fire from the vicinity of the Legislative Palace in the Republic of Panama continued to be directed against the Tivoli Guest House and adjacent areas. By 12:30 a.m., on January 10th, four additional soldiers had been wounded, making a total of six. Accordingly, General O'Meara approved a request for the use of .30 caliber rifle fire by trained marksmen for carefully directed controlled fire as a defense against identified snipers.

The crowd burned several cars in the vicinity of the Pan American Building. One car was driven into the Pan American Building at the ground level on "L" Street (Ex. P-22) and was there set afire (Exs. P-23, P-25). Numerous small fires were started in different areas and levels of the same building. Eventually the mob succeeded in getting a substantial fire started on the first floor at the "L" Street corner. By about 11:30 p.m. the entire building was in flames (Ex. P-24).

10. Rioting on Balboa Road, January 9th.

Beginning in the early evening of January 9th, attempts were made by a large unruly mob at the south end of the Canal Zone-Panama City boundary, to advance up Balboa Road from its intersection with 4th of July Avenue into the heavily populated residential area of Balboa (Ex. P-M1, P-M2). At the outset the crowd, then numbering between 500 and 800 persons, threw rocks at the eight policemen on duty at the intersection. The crowd soon was augmented by approximately 1,000 persons and as a result the police were compelled to fall back farther into

the Canal Zone. At this juncture the mob was also attacking with Molotov cocktails.

At about this time a sniper in Panama opened fire, forcing the police officers to withdraw to a stronger defense position halfway up the Balboa Road hill, about 250 yards from the boundary. The mob pressed forward, destroyed and burned a utilities facility, and a bus stop, and wrecked traffic control signs.

Segments of the mob had broken away and were trying to set fire to a wooden building located within the fenced enclosure of Quarry Heights Military Reservation. The rioters appeared determined to break through the police line; if successful, this would have given them access to the Balboa residential area. Accordingly, the police squad leader ordered the firing of one revolver volley into the ground or over the heads of the mob. At this first gunfire, the mob fell back temporarily. No casualties were observed.

An 11-man police reinforcement arrived as the mob was forming for another advance, and soon the rioters pressed forward up the Balboa Road hill. The reinforced police unit thereupon fired another volley into the air, and the rioters withdrew, again without apparent casualties.

Again the mob formed and advanced. On this occasion the police sergeant in charge prepared his men to fire by shouting the standard formal preparatory commands as used on the firing range. By the time the command "Ready on the firing line" had been given, the mob had begun to retreat and disperse. No shots were fired.

In an attempt to outflank the police, a segment of the mob left the road and climbed the side of an adjacent hill. The sergeant ordered a policeman armed with a shotgun to disperse this group. The police illuminated the area with flashlights before firing to insure that they would not hit any of the rioting mob. Warning shots

were fired into the hillside above and below the rioters. The mob then withdrew toward Panama. There were no apparent casualties.

In the meantime tear gas had been delivered, and was employed to force back the mob. The rioters there barricaded themselves behind garbage cans and sheets of steel torn from a public utility structure in the area. The police officers fired additional tear gas, and the mob retreated from this barricade toward the intersection of Balboa Road and 4th of July Avenue but still remained about 150 yards inside the Canal Zone. The police removed the barricade and withdrew out of rock range, where they remained until relieved by about 60 U.S. Army troops at about 10:30 p.m.

The Army troops immediately moved to clear the mob from the area. Initially the rioters retreated but, as the crowd grew, movement virtually halted. A number of the soldiers were hit by stones thrown from the crowd. In order to break up the mob, only tear gas was used by the troops. This was successful in clearing the area.

Soon thereafter, a mob re-formed and again surged up Balboa Road from 4th of July Avenue in an effort to enter the Canal Zone. Many rocks and Molotov cocktails were thrown at the soldiers. The troops held their positions without fire. Tear gas was again used, and the mob was repelled. By about 10:45 p.m., barbed wire had been installed across Balboa Road to prevent further incidents.

11. *Continuation of Violence at Canal Zone-Panama City Boundary.*

Throughout the early hours of January 10th, troops along 4th of July and Kennedy Avenues continued to be subject to sniper fire (Ex. P-26, P-27) and frequent attacks with rocks and Molotov cocktails. Groups of demonstrators made numerous attempts to enter the Canal Zone. The

troops used tear gas to repel them but at no time did they fire against the mob. Selected U.S. Army marksmen were under strict orders to hold their fire until the crowds had dispersed and the snipers alone could be neutralized without risk to others.

At 6:00 a.m. Friday, all entry points to the Canal Zone on the Pacific side were opened to peaceful traffic from the Republic of Panama. Troops were withdrawn from the border and only two Military Police were positioned at each check point. A brief examination was given to individuals desiring to enter the Canal Zone.

At 11:45 a.m. President Chiari requested that U.S. troops cease counter-sniper fire to permit the National Guard to take action against snipers. General O'Meara ordered cessation of counter-sniper fire. This order was complied with immediately and no subsequent counter-sniper fire was conducted by United States troops on the Pacific side throughout the remainder of the disorders.

At 12:20 p.m., about 800 Panamanians gathered at Shaler Plaza. Cries for a "March on the Zone" were heard, but no march was attempted.

During the afternoon and evening, it became increasingly apparent that the rioters were making the Tivoli Guest House their primary target. Much of the sniper fire was concentrated on that building and a large number of Molotov cocktails was hurled in an effort to set the building on fire. Because of the mob violence it became necessary to evacuate all occupants of the building. The rioters stoned and attempted to burn the building occupied by the Maryknoll Sisters and the Nuns were also forced to evacuate. The Tivoli was also fired upon by the driver of an automobile who stopped on Kennedy Avenue and stood by the vehicle to discharge the weapon.

The first incident that occurred on Saturday morning, January 11th, was on Madden Dam Corridor, which is

the highway corridor under U.S. jurisdiction that runs through Panamanian territory from the Canal Zone to the Madden Dam area, a noncontiguous part of the Canal Zone. An official of a U.S. agency in the Canal Zone, together with three other employees of his agency, was en route from Panama City in an automobile of a Panamanian employee of the agency. They had taken a circuitous route via the Boyd-Roosevelt Highway, which connects with the Madden Dam Corridor Road, in order to enter the Canal Zone by that indirect route rather than attempting to pass from Panama City into the Canal Zone at the Panama City-Ancon boundary. After passing the junction of the Boyd-Roosevelt Highway with the Madden Dam Corridor Road, and while they were on the Madden Dam Corridor Road, they ran into a pre-established roadblock. (The distance from the junction of Boyd-Roosevelt Highway with the Corridor is approximately four-tenths of a mile from the Canal Zone-Republic of Panama boundary, and the incident occurred within that portion of the Corridor.) About 20 thugs appeared from the bushes, armed with clubs and rocks, and surrounded the car. After being robbed of approximately \$110 in cash and other personal property, the United States citizens were permitted to proceed on into the Canal Zone via the Corridor.

During the morning and early afternoon of January 11th, several small groups entered the Canal Zone for a distance of a few yards to plant Panamanian flags and were not interfered with as long as they were orderly. In contrast, there were various instances of desecrating the United States flag by Panamanian rioters by burning, tearing and spitting on it, both in the Canal Zone and Panama City. (Exs. P-28, P-29, P-30, P-31).

At noon a crowd of about 50 persons from Panama assembled on the east approach to the Thatcher Ferry Bridge. The number soon grew to about 500 and they began to stone the living quarters in Balboa near the Bridge. They

broke windows and damaged parked cars which forced the evacuation of residents from the two houses nearest the crowd. Some of the mob broke lighting fixtures on the bridge but the majority advanced toward the fence at the edge of the housing area. They were repelled three times by tear gas thrown by the Canal Zone police and finally dispersed when U.S. Army troops arrived about 12:45 p.m. These troops were continually harassed, however, by stone-throwing Panamanian teenagers who were periodically dispersed by the use of tear gas.

During the afternoon of January 11th, on three separate occasions, about 200 Panamanians entered the Canal Zone in the vicinity of the Tivoli Guest House. Approximately 50 U.S. soldiers used tear gas to disperse each group.

Also, approximately 60 Panamanians entered the Canal Zone at the junction of Gorgas Road and 4th of July Avenue. They were repelled by 40 soldiers employing riot formation and using tear gas.

During the afternoon a car was burned on 4th of July Avenue. In Shaler Plaza a group sawed down the flagpole, and took it into Panama (Exs. P-32, P-33).

Starting at 8:00 p.m. and continuing through the night, automatic weapons and rifle fire from the Legislative Palace and the burned-out Pan American Building was directed at the Tivoli Guest House and nearby buildings in the Canal Zone. Approximately 400 rounds were fired into the Canal Zone from the Republic of Panama during the night. U.S. troops did not return fire.

During the daylight hours of Sunday, January 12th, the border area was relatively quiet except for one mob of about 75 Panamanians which penetrated the Canal Zone between the Tivoli Guest House and the Maryknoll Sisters' Convent. This mob was repelled by tear gas. As had happened on the previous night, at 8:00 p.m. automatic

weapon and rifle fire was again directed into the Canal Zone from the Legislative Palace, and the burned-out Pan American Building. From 8:00 p.m. on the 12th until 4:00 a.m. on the 13th of January, approximately 800 rounds were fired into the Canal Zone from the Republic of Panama.

The period from Monday the 13th, through Wednesday the 15th of January, was also relatively quiet. Panamanian workers moved in and out of the Canal Zone without incident and busses operated normally.

12. Rioting Along Cristobal-Colon Border.

On the Atlantic side of the Isthmus there was relative quiet during the first hour after rioting along the border of the Pacific terminal cities commenced. The first indications of trouble in the Cristobal-Colon area (Exs. P-M3, P-M4) were noted at 8:00 p.m. At that time about a dozen singing, shouting persons, carrying a Panamanian flag, were observed as they marched on Bolivar Street past the front of the Cristobal Armed Services Y.M.C.A.

At 9:14 p.m., a mob of 1,500 persons entered the Canal Zone at the intersection of 11th and Front Streets. The demonstrators proceeded without interference past about 10 Colon National Guardsmen standing near the intersection. The body of demonstrators proceeded down Roosevelt Avenue to the Panama Canal Administration Building. A small group of men broke off from the crowd standing in front of the building, went upstairs, and raised a Panamanian flag on one of the twin flagpoles where, during the day, the flags of Panama and the United States fly side by side. The crowd cheered the flag raising and sang the Panamanian National Anthem. A person, carrying a portable loudspeaker, was denouncing the United States and proclaiming Panamanian sovereignty over the Canal Zone.

The flag-raising ceremony was completed without interference from Canal Zone officials. Thereafter, attempts to calm the crowd were made by various persons, including Captain Howerth, Cristobal District Police Commander, and Daniel Delgado Duarte, Mayor of Colon. Although the mob was not violent at this time, it was unruly and clearly affected by the action of agitators, such as Andres Galvan, a communist leader trained in Cuba, Russia and Red China, and the conduct of certain members of the Colon Municipal Council and labor leaders who were heard to urge violence in retaliation for "what had occurred in Balboa". At 9:30 p.m., the crowd left the front of the building in a disorderly manner and headed north along Roosevelt Avenue to 11th Street in Colon (Exs. P-M3, P-M4).

A group of teenage girls leaving the Masonic Temple after a meeting nearly became enveloped by the mob as it moved past on its return to Colon. A retired U.S. Army Sergeant, residing at the nearby Y.M.C.A., stood by with a shotgun he owned to protect the girls. Without having fired it, he turned his shotgun over to Canal Zone police later that night. Soon after the girls left, a barrage of rocks and other missiles was thrown at the Masonic Temple.

Earlier in the evening a liaison agent from the Cristobal Police Station was sent to Colon National Guard headquarters to inform the Commandant concerning the gathering crowds. The Commandant, Major Bolivar Rodriguez, instructed his second in command, Captain Juan Bernal, to lead a group of National Guardsmen out into the city's streets to attempt to control the crowds.

Throughout the period of the riots, the Cristobal District Police Commander was in frequent telephone communication with Major Rodriguez and Colonel Jose D. Bazan, Second Vice President of the Republic and Chief of the Colon Fire Department. Several hundred U.S.

citizens were evacuated to the Canal Zone by the Colon firemen and a considerable number were brought out by the National Guard.

By 9:45 p.m. a crowd of about 400 persons had gathered at the intersection of 11th Street and Bolivar Avenue in Colon. Held there in check briefly by the National Guard, the demonstrators pressed on down 11th Street to Balboa Avenue. At almost 10:15 p.m., after again being briefly checked by the National Guard, a contingent of the mob surged up Balboa Avenue to a point near the Y.M.C.A. While police officers attempted to calm the forward contingent of the mob, windows could be heard being broken in Panama Canal offices adjacent to the main body of the crowd. The destruction by elements of the mob became more extensive. Windows and doors in the Panama Canal Company Office and Storage Building were broken; furniture was dragged out into the street; and pieces of office equipment were destroyed or stolen (Exs. P-34, P-35). Besides the damage to the Panama Canal Company Office and Storage Building, extensive damage was incurred in the Masonic Temple and the Y.M.C.A. (Ex. P-37).

Part of the mob concentrated on wrecking office equipment, air conditioners, records, medical supplies and furniture in the offices in the Panama Canal Company Office and Storage Building. Typewriters were thrown out into the street. Records, files and supplies were vandalized and attempts made to set them on fire.

While police were preoccupied on Balboa Avenue, other rioters entered the Cristobal Y.M.C.A. on Bolivar Avenue, looted the gift shop, destroyed furniture, and overturned file cabinets (Ex. P-36).

No ammunition was used by the Canal Zone police during the disturbances in Colon.

At about 9:50 p.m., the 4th Battalion, 10th Infantry, composed of about 700 men, moved from Fort Davis to

Cristobal. At 10:20 p.m., the Commanding Officer of Company A, consisting of about 140 men, was given the mission of clearing the Canal Zone in the area of the Panama Canal Company Office and Storage Building, the Masonic Building, and the Y.M.C.A., all of which are grouped together along the Canal Zone-Republic of Panama border.

Moving from the Cristobal dock area, Company A proceeded to the boundary at 11th and Front Streets. As was planned, this initial appearance of the U.S. Army troops in company strength was sufficient to cause a large group of Panamanians to leave this four-block area in the Canal Zone and to retreat down 11th Street and across Bolivar Avenue back into the Republic.

The Army company moved down the first block of 11th Street within the Zone, sealing off the border as they went. The company turned on Balboa Avenue and deployed into a chisel-like, standard riot-control formation to encourage the remaining rioters to go into the Republic across Bolivar Avenue, which was one block to the left of the company.

However, one violent segment of the mob refused to give way as the troops approached. This group, led by Cuba-trained Andres Galvan and his brother, threw rocks and debris at the troops. The troops about to make contact with these rioters were momentarily reluctant to advance for fear of injuring them. Encouraged by this hesitation, a number of rioters attempted to disarm the troops by grabbing at their rifles and bayonets. In grasping the bayonets the Panamanians cut themselves and in the ensuing scuffle a number were injured. Then the troops began once more to advance toward the crowd to clear the Canal Zone.

Other troops, in advancing by the Masonic Building in the Canal Zone, were jumped by about 15 rioters from the second floor windows of the Masonic Building. The

rioters had lead pipes and heavy sticks they were using as clubs. In the scuffle with the troops, several of the rioters received cuts. At no time during either of these incidents did the troops fire their weapons or launch a bayonet assault against the rioters.

As the troops forced the rioters back across Bolivar Avenue into the Republic, a platoon leader was instructed to close off 12th Street where it joins Bolivar Avenue. Up until this time no member of the United States forces had crossed the Canal Zone border into the Republic. However, the junior officer ordered to close off 12th Street, believing that the far curb of Bolivar Avenue rather than the center was the border, led about 15 of his men to the point at which 12th Street joins Bolivar Avenue. He thus inadvertently led this small contingent of his men a few feet into territory of the Republic. Within a few minutes a senior officer, noting the platoon leader's error, ordered him back into the middle of the street. The platoon leader immediately withdrew his troops as directed. While across the boundary, this small contingent did not come into physical contact with the rioters.

At no other time did any United States military or police unit cross the Panamanian boundary, either on the Atlantic or Pacific side.

Though under continuous heavy sniper fire and heavy barrage of rocks, glass, bricks, and Molotov cocktails United States troops in Cristobal were ordered not to return the fire, lest innocent persons be injured in this crowded area. At 11th Street and Bolivar Avenue, a squad leader in Company A was struck by a Molotov cocktail hurled from across the border. Pfc. Peter J. Juino was hit by a .22-caliber bullet in the foot, when his unit was in the process of attempting to drive the rioters out of the Y.M.C.A. At approximately 11:45 p.m., Specialist Paul E. Boyd was hit in the right leg by a bullet that was fired by a sniper.

Sergeant Edward Rodriguez, Jr. was the squad leader of the second squad, second platoon, of Company C, which was in front of the Cristobal Y.M.C.A. He and another member of the unit were sent out as an observation post to relay messages of new activity to the platoon leader. The sergeant was approximately five feet in front of the Y.M.C.A. at an observation post when he was shot in the shoulder by a hidden sniper firing from the République.

Private James E. Willis was shot in the leg by an unseen sniper as he was standing on the line in the riot-control formation in front of the Y.M.C.A. At 1:00 a.m. on January 10th Private David J. Haupt was killed by a sniper firing from the Panamanian side of Bolivar Avenue.

In face of the severe losses from sniper fire, the company commander moved his platoons to buildings just inside the Canal Zone border to provide more protection from the sniper fire.

At 2:00 a.m., Staff Sergeant Luis Jiminez-Cruz of Company B was shot in the head and killed while directing his men to protected positions around a roadblock established at 13th and Bolivar. The men of Company B were pulled further back into the Canal Zone to afford them the protection of buildings, after a sniper shot and killed the company's first sergeant, Gerald A. Aubin, and wounded the company commander, First Lieutenant Alexander H. Evans, while they were checking the positions of the troops at 4:00 a.m.

The U.S. forces never fired ball ammunition in the Cristobal-Colon area except for ten rounds used on the early morning of January 10th to knock out street lights in the Cristobal area which exposed the U.S. soldiers to the bullets of Panamanian snipers. It was necessary for the local commander in the Cristobal area to seek specific approval from General O'Meara, the Commander in Chief,

Southern Command, for firing these 10 rounds at street lights.

A stone-throwing crowd at 16th Street and Bolivar Avenue at 9:50 a.m., January 10th, forced the driver of a Panama Canal moving van to abandon the vehicle there. The van was set on fire.

At 10:00 a.m. an attack of Molotov cocktails was launched against the Cristobal Y.M.C.A., setting the building on fire. Sniper fire hindered Canal Zone firefighters who attempted to control the blaze. Company C, which had taken up positions in the Y.M.C.A. was forced by the fire to evacuate the building shortly after 2:00 p.m., and the second platoon took up sandbag positions in the parking lot behind the Y.M.C.A.

The rioters then shifted their attack to the Masonic Temple, again employing Molotov cocktails. The company was forced to move the command post from the Masonic Temple that afternoon but was able to maintain an observation post on the top floor of the structure.

The Y.M.C.A. continued to be a target for Molotov cocktails during the day. Sniper activities continued at 12th Street and Bolivar Avenue. The barrage of rocks from across Bolivar Avenue at 11th Street in Colon resumed at 11:38 a.m. During this disturbance, a group of people ran a car up on the sidewalk at 11th Street and Balboa Avenue and set it on fire.

A group of about 200 people in the area of 11th Street and the railroad tracks was forced back into Colon by the use of tear gas.

The soldiers who remained in the observation post on the top floor of the Masonic Temple continued to receive heavy sniper fire for two and one-half hours in the evening of Friday, January 10th. That evening at the building of the Cristobal Credit Union, troops of Company B were faced with a group of about 50 people attempting to set

fire to the building. The mob was dispersed with the use of tear gas while Canal Zone firemen extinguished the fire.

U.S. troops, who had exercised the utmost restraint while suffering heavy casualties without returning any of the sniper fire, listened without breaking discipline when a loudspeaker from Front Street challenged: "The United States forces fired upon defenseless and peaceful students without provocation. Shame on such a big and powerful nation attacking a small one that does not have the means to defend itself."

At 11:29 a.m. on January 11th about 200 persons set fire to the Panama Railroad spur track that extends from the pier area to Front Street on the Panama side of the boundary.

Two fires were started in the Panama Canal Company Office and Storage Building at 11th and Front Streets in the Zone at 11:50 a.m. The fire got out of control because sniper fire prevented the entry of Canal Zone firemen. The building was evacuated at 4:15 p.m. and was completely destroyed.

At 2:00 p.m. a mob of about 300 tried to infiltrate through the dock area but was repulsed by troops using tear gas.

During this period rioters completely burned the Canal Zone Sanitation Office.

By 2:45 p.m. on January 11th, three American soldiers had been killed and 12 had been wounded by sniper fire from the Colon side. Because of this fire, for several hours it was impossible to get food to the troops in the Masonic Temple, or to rescue the wounded in the building. Five hundred to 700 rounds of sniper fire had penetrated the Zone during the day. There had been no answering fire from the United States troops. Tear gas was ineffective to rout the snipers. At this time the local commander requested permission to use shotguns for counter-sniper fire. Approval was granted by General O'Meara.

Ball ammunition was never fired into the Republic of Panama by United States troops in the Cristobal area.

The Colon National Guard and Colon firemen made an appeal to the citizens for order at 4:45 p.m. At 5:36 p.m. approximately 500 shouting people congregated at 16th Street and Central Avenue and, at 6:25 p.m., a mob tried to surge across the Army lines to set the piers on fire.

Molotov cocktails were thrown at the Old Cristobal Fire Station at 6:32 p.m. and at 7:06 p.m. Canal Zone police moved 16 prisoners from the Cristobal jail to Gatun for security.

On January 12th, heavy sniper fire and Molotov cocktails were prevalent in the Masonic Temple area. Snipers wounded a Red Cross truck driver as he attempted to evacuate the injured from the Masonic Temple. A group entered the Esso gasoline station across the street from the Cristobal Y.M.C.A. and filled bottles and cans with gasoline. Sniping and fire bomb activity continued until midnight and the crowds dispersed shortly thereafter.

The Colon National Guard took effective control of the Colon side boundary at 5:10 a.m. on Monday, January 13th. Thereafter U.S. troops ceased the use of all riot control weapons. The National Guardsmen immediately conducted a search of all houses on the Colon side of the boundary. No significant incidents were reported on that date.

At 8:00 a.m. on Thursday, January 16th, General O'Meara relinquished control of the Canal Zone to Governor Fleming.

13. Events Affecting the Colon Corridor.

The riots and disturbances on the Atlantic side of the Isthmus twice compelled the United States to establish traffic check points within the Colon (highway) Corridor

(Exs. P-M5, P-M6). Except for one intersection (where it crosses Randolph Road) the Colon Corridor is under the jurisdiction of the Republic of Panama.

The Corridor runs for about four miles between the city of Colon (which is an isolated part of Panama surrounded by Canal Zone territory) and the Canal Zone-Panama border near the town of Cativa. The Corridor varies in width from 100 feet to 200 feet. The highway within the Corridor forms part of the Boyd-Roosevelt Highway, the principal route across the Isthmus and affords Panama a highway connection under its jurisdiction between the city of Colon and the Canal Zone-Panama boundary near Cativa.

During the first two full days of mob violence in Colon, i.e. January 10th and 11th, United States forces defending lives and property in the Canal Zone from the onslaught of the rioters twice established traffic check points within the Colon Corridor in order to prevent the mob from endangering the lives and property of the residents of the Rainbow City housing area.

The Colon Area Check Points

Since early December 1963, vehicular traffic had been precluded from using the Corridor highway near Colon by barricades of barrels and boards which the Panamanian Government erected to facilitate repair of the highway. From the time that Panama erected these barricades until after the January riots, there was no vehicular traffic on the mile and one-half portion of the Corridor near Colon where the U.S. was first required to establish a check point.

Hazard to life and property and the protection and security of the Canal required maintenance of this check point from January 10th at 5:30 a.m. until January 11th at 2:25 p.m. On the night of January 9th, United States

forces found that the check point they had established on the principal United States highway out of Colon to bar rioters from entering the Zone, was being circumvented by many rioters. (See First U.S. Check Point, Ex. P-M5, P-M6.) These Panamanians were walking along the Colon Corridor adjacent to the U.S. check point in Canal Zone territory and then circling behind the roadblock established in December 1963 by Panama.

It became clear that this traffic of rioters in the Corridor was posing a major threat to the safety and security of life and property in the Canal Zone. For that reason the local commander of the U.S. forces contacted the local commander of the Panamanian National Guard and asked that he establish a check point on the Colon border, but the Panamanian commander declined to do so, giving no reason for his refusal. Therefore, to protect the Canal and as a matter of self-defense, U.S. forces controlled pedestrian traffic at this point in the Colon Corridor for the next 32 hours. (See Second U.S. Check Point, Ex. P-M5, P-M6.)

Since the Panamanian-constructed barrel barricade was already effectively halting vehicular traffic, the new check point was utilized to control only the movement of pedestrians. No pedestrians were denied passage through the Corridor at this check point. This check point was discontinued at 2:25 p.m. on January 11th. Shortly after, Panamanian National Guardsmen established a similar one at the same location and performed essentially the same screening function.

On the morning and afternoon of January 11th, a group of Panamanian rioters harassed traffic approximately 100 yards in front of the U.S. check point. This unofficial Panamanian check point denied passage to many vehicles and pedestrians.

While the United States check points were in operation, where there was vehicular traffic, such traffic was stopped

and cars were inspected, but only drivers who had ammunition or weapons were denied passage. Inspectors merely looked into vehicles and examined trunk compartments. Automobile passengers were not searched or required to dismount except when firearms were discovered in the vehicle. No cargo-carrying vehicles or trucks of any description were denied passage at any time. Cars bearing official government license plates of the Republic of Panama were not stopped or inspected. Panamanian emergency vehicles using red lights or sirens were permitted free access without being required to stop.

The Randolph Road Intersection Area Check Point

In the second instance of United States control of traffic within the Corridor, United States forces established a check point in the Colon Corridor commanding the intersection of Randolph Road and the Boyd-Roosevelt Highway. (See Third U.S. Check Point, Ex. P-M5, P-M6.) This traffic control lasted from January 10th at 6:00 a.m. until January 11th at 2:15 a.m.

When circumstances permitted, this check point was moved to points on Randolph Road in Canal Zone territory. (See Fourth U.S. Check Point, Ex. P-M5, P-M6.) Traffic control was again exercised in the same fashion as in the case of the previous check points; with the exception of a group of 15 rioters (one of whom was firing a rifle) who attacked the check point, no pedestrian or vehicular traffic was denied passage through the check point.

National Guard Traffic Control

The National Guard established a traffic check point on the Corridor Road between the Randolph Road intersection and the Republic of Panama border from 1:55 p.m. on January 11th until 4:30 p.m. on the same day. The United States had requested the National Guard to establish this check point by the Coco Solo Hospital, which is in the

Canal Zone, but can be reached by road only via the Corridor. The United States request was prompted by reports that a group of 200 demonstrators was moving toward the hospital. The demonstrators appeared at about 2:00 p.m., but they were told by a National Guard lieutenant there that they could not pass, and they did not go beyond the check point.

Legal Position

The United States actions in the Colon Corridor were authorized by the 1936 General Treaty of Friendship and Cooperation between the United States and Panama. Article X of that Treaty provides that in case of any threat of aggression which would endanger the security of the Panama Canal, the United States and the Republic "will take such measures of prevention and defense as they may consider necessary for the protection of their common interests."

Article X further provides that any measures which either country takes affecting territory under the jurisdiction of the other will be the subject of consultation between the two governments.

A 1939 exchange of notes concerning the 1936 Treaty indicates the understanding of the two governments that "in the event of an emergency so sudden as to make action of a preventive character imperative to safeguard the . . . security of the Panama Canal" the United States need not delay action to meet the emergency pending consultation, although it will make every effort to consult the Government of the Republic after taking the necessary action in question.

As has been noted, the local commander of the National Guard refused the request of the local United States forces commander that the Guard establish a control point within the Corridor to Colon on the morning of January 10th. The United States was, therefore, authorized under Article X to protect the Canal from threats of aggression by the

rioters who were entering the Canal Zone through the Colon Corridor. The same was true in the case of the check point near Randolph Road. Fortunately, prior consultation proved fruitful in the third case of traffic control in the Corridor and U.S. and Panamanian cooperation safeguarded Coco Solo Hospital.

The Pacific Area

On the Pacific side, United States forces faced the same problem of controlling traffic as was faced in the case of the Colon Corridor on the Atlantic side. Both where the highway from Arraijan to Panama City approaches Panama City and on the west side of the Zone where the same highway approaches the town of Arraijan in the Republic, check points had to be established within the Canal Zone to prevent rioters from entering the Canal Zone and endangering the Canal and the lives and property of persons living in the Zone. Unlike the Colon Corridor, Panama does not have any jurisdiction over the territory traversed by the highway or over the highway itself. This territory and the highway are parts of the Canal Zone and subject to the exclusive control and jurisdiction of the United States, just as is the rest of the Zone.

For a period during the riots, five check points existed on the highway between Panama City and Arraijan. Four of these were the temporary check points established by the United States on the highway. The fifth check point is in Arraijan and is permanently maintained and operated by the National Guard, which checks all traffic entering the Canal Zone from that city. The temporary operation of all four check points established by the United States to prevent the entrance of rioters and arms and ammunition, as well as the permanent station maintained by the National Guard, proceeded without incident during the period of the disturbances.

At some times, however, traffic was completely stopped in the area of the Thatcher Ferry Bridge across the Canal because of the dangers to civilians in the nearby housing area and to the security of the bridge, which is completely within the Canal Zone and is under the control of the United States.

Full cooperation existed between the authorities at the temporary United States check points nearest Arraijan and the permanent Panamanian check point in the city. Except for one truck containing a cargo of gasoline and rags, the vehicles escorted by the National Guard through its check point were granted passage through the United States check points.

Just as on the Atlantic side, some Panamanian rioters established rump road blocks on the bridge approach facing the City of Panama within Canal Zone territory. Again as on the Atlantic side, at all times when the rioters themselves did not prevent it, pedestrian traffic was allowed to enter and leave the Canal Zone through the check points after a brief check for firearms. Every effort was made to minimize delays of vehicular traffic. At no time was an emergency vehicle delayed.

Legal Position

Absolute legal authority for these United States actions was granted in the 1903 Convention. Under Article III Panama granted the United States exclusive jurisdiction and control of the Canal Zone. Panama's rights of transit over public roads in the Zone under Article VI of the 1903 Convention are specifically subordinated to U.S. rights under the Convention. Among these is the right to protect the Canal and its auxiliary works.

14. Subsequent Developments.

The incidence of violent acts by lawless groups began to abate by January 13th. At 8:00 a.m. on January 16,

1964, General O'Meara relinquished control of the Canal Zone, and the civil authorities reassumed responsibility for the civil protection of the Canal Zone.

Since the 16th of January, with few exceptions, conditions on the Canal Zone-Panama boundary have been essentially calm. However, several incidents occurred which reflect a continued need for security precautions. One occasion, on January 27, 1964, involved an unsuccessful attempt by a single individual to set fire to the Tivoli Guest House. On the evening of January 28, 1964, several heavy concrete slabs were placed on the tracks of the Panama Railroad in an isolated area in an unsuccessful attempt to derail a freight train. In addition, there have been numerous incidents of stoning on 4th of July Avenue and the east approach to the Thatcher Ferry Bridge by small groups of Panamanians.

PART II—CIVIL SECURITY FORCES—CANAL ZONE AND PANAMANIAN

1. *The Canal Zone Police Force.*

At the time the disturbances began on January 9th, the authorized strength of the Canal Zone police force totaled 185 men.

The mission of the Canal Zone police force is to carry out the functions of civil law enforcement within the Canal Zone with the added function of maintaining and operating the Canal Zone Penitentiary and a number of jails. Under normal conditions the size of the force is maintained at such a low number because of the peaceful nature of Canal Zone residents and of personnel who are employed within the Canal Zone. It has never been contemplated that the Canal Zone police force would be capable of repelling a major hostile incursion from the Republic of Panama or of controlling massive, sustained rioting in the Canal Zone by Panamanian residents. During the entire history of the Canal, the Canal Zone police

force has had a close, cordial, and effective relationship with the Panamanian National Guard and has relied on that organization to maintain peace and order along the Panamanian side of the border.

2. The Panamanian National Guard.

The Panamanian National Guard is the only security force of the Panamanian Government. Under the Panamanian constitution, the President of Panama is Commander-in-Chief of the Guard. As of January 9, 1964, the Panamanian National Guard numbered about 3,000 of whom about 148 officers and 1,600 enlisted personnel were stationed in Panama City and vicinity. In Colon, there were about 18 officers and 241 enlisted men.

The National Guard is known to have a good capability for controlling riots or civil disturbances, particularly in the units stationed in or near Panama City. Since May of 1963 more than 190 guardsmen stationed in Panama City have received extensive riot-control training under instructions furnished by the Inter-American Police Academy at Fort Davis, Canal Zone. Considerable riot control equipment including tear gas bombs was made available to the National Guard during the past year and it received a substantial number of vehicles from the United States.

The Panamanian National Guard was in a full state of readiness on the 9th of January. For some time prior to that date the Guardia personnel not on duty had been generally confined to their barracks, maintained at control points, so that they would be available for instant call in the event an emergency developed. The Panamanian Government had taken that action in view of the general tension existing in an election year and in view of the recognized possibility of disturbances arising from the threats of a transportation strike and/or a general strike in the city of Panama resulting from the extended chauffeurs' strike that existed in the Canal Zone.

PART III—ROLE OF PANAMANIAN PRESS, RADIO, TELEVISION, AND PUBLIC OFFICIALS IN INCITING VIOLENCE

1. *Introduction.* Panama's radio, television, and press overwhelmed the people of Panama with a highly emotional and one-sided story of the rioting and violence of January 9th and the following days. With no other sources of information, the Panamanian public appeared to accept the accuracy of these reports without question.

There can be no doubt but that the inflammatory tone and the one-sided, incomplete, often confused, and frequently false information that was poured out by these media contributed significantly to losses of life and property suffered during those tragic days.

The public statements of officials and other prominent citizens of the Republic were additional factors in the situation.

Possibly as damaging to public order and the nation's welfare was the approval by all the information media and many of the public figures of the riotous and destructive actions of the students and adults who made up the mobs. The rioters who stoned, overturned, and burned automobiles, beat innocent passers-by, looted and burned U.S. and Panamanian buildings, killed and wounded Americans, shot at their own people, and committed other crimes were characterized without distinction as heroes and patriots, and, if killed, whether by gunfire, cremation while looting, or other accident, as martyrs. There is little wonder that the Panamanian public, especially the youth, eagerly rushed into the streets to commit acts of violence seemingly condoned by the Panamanian radio, television, press, and notables.

This attitude was endorsed and encouraged by the news media in still another way. At least during the first hours of the disturbances, they informed the rioters that there

was no need to fear interference from the National Guard. In fact, several of the radio commentators indicated that the rioters might actually expect support and assistance from the National Guard.

Further, some of the radio stations issued announcements pinpointing the next likely location of intensified mob violence. This attracted large numbers of people to the scene to participate in the rioting.

Dozens of emotional-packed words and phrases were broadcast by the various Panama radio stations during the first twenty-four hours: "Insolently training their guns on Panamanians . . . brutal action . . . aggression displayed against the defenseless Panamanians . . . our students are dying every minute . . . invading army . . . savagery . . . vile aggression . . . massacres and assassinations defenseless people . . . sinister spectacle of their hatred . . . assassinated youths . . . ravage our people." (See Exhibit B)

Radio Tribuna asserted that "Youths of the Zone attacked the Panamanian youths and later destroyed our flag," and that "the Canal Zone policemen stood by without intervening." This falsehood, broadcast at 8:30 p.m. (Ex. B, p. 8) at the height of the mob violence along the Canal Zone/Panama City border, was the sort of propaganda most likely to enrage the Panamanian people, who are highly sensitive to indignities toward their nation.

Commentators erroneously described the U.S. Army's tracked, armored personnel carriers, as "tanks", and this error undoubtedly gave thousands of listeners a completely distorted picture of the Army's response to the mob violence. No tanks were used at any time during the rioting.

The frequent mention of U.S. Army machine guns, and of machine gun fire directed at the Panamanians, also was completely incorrect. This fact was underlined by General

Andrew P. O'Meara, Commander in Chief, United States Southern Command, who affirmed that belted ammunition, essential to the machine guns, had not been issued.

2. Press.

All the Panamanian newspapers published biased, erroneous, and inflammatory accounts of the flag incident and the ensuing disturbances (See Exhibit C).

For example, the red and black-lettered front page headline in the January 9th issue of *Critica* read: "ZONE STUDENTS SAY 'THE PANAMA FLAG NO!'" *Critica's* report stated that the Zone authorities had decided to cut down the flagpole in front of Balboa High School because the Canal Zone students had defied the order given by Canal Zone Governor Fleming that the Panamanian flag be raised at that school. Cutlines under a photograph of the United States flag flying in front of Balboa High School said the flagmast was ordered cut down by the Canal Zone Governor "in view of the negative action of the students who didn't want Panama's national emblem raised beside the United States emblem." (Ex. C, p. 15)

The Panama Canal Information Officer informed the editor of *Critica* that the Balboa High School students were not protesting against flying the Panamanian flag but only against the removal of the United States flag. Nevertheless *Critica* never corrected its erroneous report.

El Dia on January 13th headlined reports of "North American barbarians who massacred, of savage soliders who shot into Panamanion masses."

Editor and columnist Guillermo Rodolfo Valdes wrote that Panama Assemblyman Harmodio Arias, Jr., an owner and director of the Arias publishing chain of four newspapers, told 50 Panamanian newsmen on January 11th that "We should lynch the savage Zonians." (Ex. C. p. 37)

El Panama American reports of the January 9th and subsequent incidents were characterized by such expressions as "the blood of Panamanian youth flows in the Canal Zone streets in new patriotic manifestations," and "Panamanian sovereignty and liberty should be defended to the last drop of blood, even to life itself."

Like the other newspapers, the usually more reliable *La Estrella de Panama* made no effort to check facts and published a lurid report on January 10th that "the troops had heavy tanks with cannon and some lighter tanks with lighter guns." On page 10, under a headline "MASSACRE IN 5TH OF MAY PLAZA," the erroneous statement was made that "the North American troops invaded our streets around 5th of May Plaza and the Legislative Palace, opening intensive fire with their modern arms and machine guns."

Another *La Estrella de Panama* report attempted to justify the burning of buildings of United States firms in Panama as vengeance against a massacre.

La Estrella on January 13th spoke of the "murders occurring in the streets and central plazas of the capital city into which the North American war tanks chased our students and people, patriotically excited by the barbaric aggression."

3. Radio Stations.

Radio broadcasting in Panama during the period of the riots was inflammatory.

At 7:55 p.m., Thursday, January 9th, Onda Popular announced "A total of 400 University students are retaliating for action of the Balboa High School demonstrators who stepped on and tore apart a Panamanian flag earlier this evening. The Panamanian students are now burning an American flag. They have joined a demonstration of 15,000

people in Panama City, in protest against Canal Zone treatment of the national emblem." (Ex. B, p. 6)

The mob that attacked the Ancon Laundry, railroad station, and freight house and almost overran the Ancon housing area, all within the Canal Zone, was described by Onda Popular at the height of the riotings as "Panamanian adults and students who converged here to protest the trampling of the Panamanian flag." A moment later the same station broadcast: "The building of the Pan American Airways, opposite the Legislative Palace, has all its windows shattered, and the huge neon sign was destroyed by Panamanians who were angered by the police of the Zone who fired mercilessly against the peaceful Panamanians who tried to take the flag to the Zone." Shortly afterward these individuals succeeded in burning the building.

At 9:30 p.m. Radio Tribuna broadcast: "... The people continue massing in anger ... One valiant youth with a Molotov bomb hurled it at a tank, but it fell short. The Panamanians are bravely facing the superiority of the North American weapons. Another youth just fell injured ... " (Ex. B, p. 12)

At 10:35 p.m. Radio Tribuna reported, "Scores of persons are now armed with bottles filled with gasoline, Molotov bombs, and are throwing them at the U.S. Army tanks, although they fall short. But some more daring youth are running toward the tanks." (Ex. B, p. 16) Ten minutes later the same station broadcast, "... A National Guard official has just reported that six persons have now died from bullets fired by the Canal Zone police and U.S. Army. The Panamanians now have been fighting against the Zone for five hours with breast bared to the fire of the machine guns, tear gas, and power of the U.S. Army in the Zone." (Ex. B, p. 16) At 10:55 p.m., "Here on the border with the Canal Zone a kind of truce, a lull, has set in although some patriotic youths continue to hurl Molotov bombs sporadically."

cally." (Ex. B, p. 17) At 11:20 p.m., "From our position on the corner of the 'Good Neighbor' bar we were able to observe a suicide attack by students with Molotov bombs against the armored cars of the U.S. Army. After throwing the bombs, the students retreated." (Ex. B, p. 19)

Panamanian National Assembly Deputy Thelma King, the owner of Tribuna, declared over that station at 2:20 a.m., January 10th: "The Panamanian people wrote today the most beautiful page in our history, because they showed the North Americans that before the force of the bullets, the force of reason will triumph, and tomorrow or the day after, only one flag will fly in the Canal Zone. It will be the Panamanian flag." (Ex. B, p. 27)

An editorial from the newspaper *El Dia* read over Radio Musical at 5:40 a.m. included, "... North America has played its last card against Panama. Last night's incidents reaffirm our definite sovereignty from border to border. The martyrs of the flag have not died in vain." (Ex. B, p. 32)

On January 10th at 12:30 a.m., Radio Tribuna broadcast, "Panamanian people, we cannot permit this. Hundreds of youths are approaching us demanding arms to defend themselves. We here in Radio Tribuna are asking them to remain stable, to maintain peace." But this was followed immediately by, "But it is a crime to attack people with machine gun fire. At these very moments, they fired against the crowds with machine guns for about five minutes. This fills us with indignation. The people of Panama are asking the National Guard to come and fight with the support of the Panamanians against the Canal Zone troops." (Ex. B, p. 21)

Radio Tribuna reported at 12:50 a.m. that 10,000 people bearing a huge flag were advancing toward the Legislative Palace at the Canal Zone-Panama boundary and defying the bullets of the U.S. Army. Then the announcer added,

"We believe calm should be maintained, otherwise the useless bloodshed will continue." (Ex. B, p. 24)

By about noon on January 10th, all of the nation's radio stations were brought into a single national network (Gran Cadena Nacional—Grand National Network) with microphones in the Presidencia (Ex. B, pp. 57-60). All broadcasting was supervised by President Chiari's press secretary. It was not until January 13th that all stations resumed individual broadcast schedules.

Reporting Inaction of the Panamanian Authorities

Panama's radio announcers not only by word and implication gave the rioters the nation's blessing in their depredations, but, in addition, they repeatedly provided assurance that the Panamanian authorities would not interfere through the use of the National Guard.

At 7:30 p.m., Radio Aeropuerto revealed, "... The National Guard has remained aloof from all the incidents." (Ex. B, p. 6)

One hour later as the violence reached its highest pitch along the length of Kennedy Avenue, Radio Tribuna announced, "... The National Guard reportedly is siding with the Panamanians to defend our sovereignty." (Ex. B, p. 8) The same station stated at 9:10 p.m., "The National Guard is helping the Panamanians." (Ex. B, p. 11)

At 12:35 a.m., Radio Tribuna reported on the situation inside Panama City at the area where mobs destroyed the offices of the United States Information Service: "... Now a National Guard cavalry squad is approaching ... Apparently the Guard is cooperating with the Panamanians in their fight with the Zone." (Ex. B, p. 22)

At 12:51 a.m., January 10th, Tribuna announced: "Last minute news is that a group of National Guard members with rifles and guns are in front of the 'Relax' bar. They

have orders that, if the U.S. troops which are on the other side of the 4th of July Avenue in front of the Pan American Building open fire again against the Panamanian people, to join the Panamanian people and open fire against the U.S. Army. We have not confirmed this." (Ex. B, p. 24)

4. *Television.*

Television stations in Panama also kept the Panamanian people aroused. Reference to members of the mob as heroes and to the dead as martyrs implied a government and national approval of the acts of the students and of the mobs. The entire series of events was reported as a patriotic demonstration.

Deliberate attacks on individuals, burning of cars and other property, tearing down of fences along the Panama—Canal Zone boundary, and destruction of street lights and traffic standards were explained as manifestations of indignation against the acts of the United States citizens. The indication given listeners was that the actions were justified and patriotic. The U.S. troops were pictured as vicious, and as oppressing the "defenseless" Panamanian public, despite the fact that the mobs were armed with stones, pipes, bottles, sticks, and Molotov cocktails, and in some instances with firearms. Later, pictures were telecast of dead bodies, together with statements placing responsibility on the United States for the deaths.

5. *Public Officials.*

Panama President Roberto F. Chiari, in a talk to the nation at 12:40 a.m., January 10th, gave his solemn promise "that the blood of the martyrs who perished today will not have been shed in vain." (Ex. B, p. 23) In an address later in the day he appealed to the citizens to keep calm "and to pay no heed to demagoguery, which might be used by elements who in reality are seeking another damaging end for all Panamanians." (Ex. B, p. 51) It was

reported in *El Dia* that Panama National Assemblyman Harmodio Arias, Jr. stated in an address before Panama newsmen on Saturday, January 11th, "We should lynch the savage Zonians." (Ex. C, p. 37)

"Panamanian people cannot continue to be massacred," said National Assemblywoman Thelma King in a 2:20 a.m. broadcast on January 10th. "Tomorrow or the day after," she said, "only one flag will fly in the Canal Zone. It will be the Panamanian flag." (Ex. B, p. 27)

Panama's Foreign Minister Galileo Solis told University of Panama students at a mass meeting January 10th: "In this tragic hour, when defenseless Panamanians have been the object of vile military aggression by troops of the most powerful nation on earth come to show their valor, courage, and thirst for blood which they have not been known to show in other parts of the world where they are frequently challenged but do not respond."

Miguel Moreno, Jr., former Foreign Minister of Panama, wrote to President Chiari concerning the flag incident and its aftermath. His letter, which was carried by the Panamanian press on January 15th spoke of "the inhuman and unjustifiable aggression of the U.S. Armed Forces against peaceful and defenseless Panamanian citizens."

6. Conclusion.

By general abandonment of objective reporting and substitution of deliberate incitement to violence and resort to statements calculated to influence the emotions of the entire populace, the, Panama radio, television, and press undoubtedly greatly intensified and prolonged the rioting and violence during the period January 9th through 12th. Similarly, speeches and public statements made by high-ranking officials of the Panamanian Government contributed significantly to the creation and maintenance of an atmosphere of excitement and indignation conducive to violence against United States citizens and the Canal Zone.

PART IV—EXTREME LEFTIST ELEMENTS

It is significant that the rioting occurred so quickly, was so widespread and violent, and continued for such a prolonged period of time. Neither the long-held views of many Panamanians nor the flag incident itself seems wholly adequate justification for what took place. The United States knows that these are matters of great concern to the Commission and herewith offers some evidence it has bearing on these questions.

The United States' presentation to this point has given two, of what may well be a number of reasons, for the sudden rioting and the prolonged mob and sniper attacks on U.S. personnel and property in the Zone: the distorted, vicious radio broadcasts encouraging violence by Panamanians, and the lack of timely and effective action by Panamanian authorities. There is strong evidence that there is also a third reason—the activities of well-trained Communist agitators.

The OAS Peace Commission arrived on Saturday, January 11th, during the rioting. Representatives of the United States Government informed the Panamanian Government representatives that day, in the presence of the Commission, that we had information that 10 of the most persistent agitators seen urging the crowds to invade the Zone, especially on Saturday, January 11th, were Communist, some of them trained in Cuba, the Soviet Union, and Red China. The Panamanian Government in the Peace Commission asked that evening for the names of those persons so that it could take action to place them in confinement. The United States Government representatives gave the designated Panamanian authorities the names of these 10 individuals on the evening of January 11th. Despite this, on the following morning, Sunday, January 12th, six of these 10 trained Communist agitators were seen leading the funeral procession through Panama City.

It is important to identify a few of these agitators.

Floyd Britton is a Communist Youth leader who was trained in Cuba for several months in late 1961 and early 1962. He is a member of the Communist Party of Panama, has been in other Iron Curtain countries and participated actively in the Cerro Tute uprising in April 1959 and in the student riots of 1958 and 1959. On January 9th he was active in destroying the Canal Zone Bus Terminal and agitating mobs to violence. Throughout the remainder of the rioting he was active on the Pacific side in inciting mobs to violence.

Cesar Carrasquilla is a Communist student leader and a member of the Castro-controlled Vanguard of National Action. He was at the National Institute on January 10th inciting students to violence and was also agitating throughout the subsequent days of rioting on the Pacific side. On February 6th he departed for the Soviet Union and is probably still there at this time.

Huberto Bruggiati, a member of the Communist Party of Panama, who has been trained in Cuba and other Iron Curtain countries, and who participated in the Cerro Tute uprising in April 1959 and in the student rioting of 1958 and 1959, was seen agitating and inciting others to violence on the Pacific side.

Alberto Calvo, a member of the Communist Party of Panama and student leader at the University of Panama, was also seen inciting students and others to acts of violence during the rioting.

Virginia Ramirez, Communist Party member, who participated actively in the 1958-1959 riots in Panama, was also seen during the rioting inciting students and others to acts of violence on the Pacific side.

These are but a few examples of extreme leftists who incited and agitated throughout the weekend to keep violence and rioting against United States citizens in the Zone at a fever pitch as long as possible. This extremism should.

not be confused with the sincere patriotic nationalism of most Panamanians. There is no intention to comment on or to disparage the feelings of many Panamanians about the Canal issue. It must be recognized, however, that extreme leftist opportunists, trained and helped by Cuba and other communist countries, for their own purposes and for the purposes of the causes they serve, attempted with considerable success to divert the legitimate aspirations of many Panamanians into an outburst of prolonged violence, terror, and plunder with many tragic and irreversible consequences. Looking to the future, their purposes and activities justify continued concern by all interested in Hemispheric peace and solidarity.

PART V—DEATHS, PERSONAL INJURIES AND PROPERTY DAMAGE IN THE CANAL ZONE

The extensive rioting by residents of the Republic of Panama that commenced on January 9, 1964 resulted in five known deaths in the Canal Zone. The violence also caused personal injury to 201 civilians and military personnel who sought treatment in the Canal Zone. In addition there was widespread damage to United States Government facilities and to private property. The casualties and damages are separately described below.

1. *Deaths and Personal Injury.*

During the rioting snipers were active on both sides of the Isthmus, firing from Colon and Panama City, Republic of Panama, into the Canal Zone. At the Atlantic end of the Canal Zone three U.S. Army enlisted men were killed and 15 U.S. military personnel and three civilians were wounded in the Canal Zone by sniper fire. At the Pacific end of the Canal Zone nine U.S. military personnel and three civilians were wounded in the Canal Zone by sniper fire. In addition to the deaths and injuries from sniper fire, a civilian was hit and killed on the roadway of the

east approach to the Thatcher Ferry Bridge by an automobile whose driver was escaping from the violent actions of the mob and a U.S. Army soldier was fatally injured in an accident while on patrol duty in the Canal Zone.

Others were treated in the Canal Zone for injuries caused by rocks, Molotov cocktails and other missiles thrown by the rioting mobs and by deliberate beatings at the hands of the mob.

At the Atlantic terminus of the Canal, 51 U.S. military personnel and 29 civilians were treated for injuries from these causes. On the Pacific side 14 military personnel, one Peruvian naval cadet and 32 civilians were treated for injuries received in this manner. One of the civilians stoned by a mob at Panama city while entering the Canal Zone has lost the sight of an eye as a result of the injury.

The United States Government is not in a position to analyze the conflicting reports concerning Panamanian casualties to determine how many of them were caused by U.S. action. It is certain that a number of Panamanians suffocated in the burning of the Pan American Building, a fire caused by the Panamanians. The United States Government also has several affidavits by U.S. military officers who observed Panamanians shooting at Panamanians. This is a serious charge which requires investigation by means not available to the United States Government.

2. Property Damage.

The rioting mobs crossed the border and invaded the Canal Zone on numerous occasions. These invasions resulted in heavy damage to Panama Canal Company and Canal Zone Government facilities, buildings and other property. The estimated replacement or repair cost for the Panama Canal Company-Canal Zone Government damaged facilities is in excess of \$1,508,000.

On the Pacific side of the Isthmus the following Panama Canal Company-Canal Zone Government facilities were damaged by the mob action.

Ancon Railroad Station ransacked with office equipment and supplies scattered and destroyed. Freight shipments in the Station looted and burned.

Railroad coaches at Ancon Station damaged by fire.

Ancon Freight House damaged by fire started with Molotov cocktails.

Ancon Laundry damaged by fire.

Shaler Bus Terminal looted and damaged by fire.

Tivoli Guest House damaged by fire started with Molotov cocktails and by sniper fire.

Street lights and traffic signals damaged and destroyed. The fire damage listed above would have been much more extensive but for fire equipment on the scene which immediately extinguished the fires.

On the Atlantic side of the Isthmus the following Panama Canal Company-Canal Zone Government facilities were destroyed or damaged by the mob action (Ex. P-31, P-32).

Panama Canal Office and Storage Building, Cristobal, containing the Cristobal Railroad Station and other Railroad Division offices, Central Employment Office, Navy Oceanographic Office, Cristobal District License Examiner's Office, Public Health Nurse's Office, Red Cross Office, and a Panama Canal warehouse area, gutted by fire with all supplies and equipment destroyed.

Many railroad ties on the main line and adjacent sidings destroyed by fire.

Sanitation Office destroyed by fire.

Street lights, traffic and railroad signals destroyed.

The private property in the Canal Zone damaged in the riots included the Cristobal Y.M.C.A. which was totally destroyed by fire at a loss of \$342,000 (Exs. P-33, P-34). The Masonic Temple in Cristobal and other lodges, churches and steamship agencies in the Canal Zone were damaged by mob action, fire and looting at a loss of \$102,000. The American Red Cross in Cristobal suffered losses of \$1,500 by fire and 30 tons of CARE food supplies valued at \$10,000 were also burned. Reports received by the Panama Canal Company to date cover the total destruction of 17 private autos and damage to 60 others at a loss in excess of \$28,000. In addition, other private property and personal effects of residents and concessionaires in the Cristobal Y.M.C.A. and Masonic Temple values at \$27,000 were damaged or lost due to fire, looting and vandalism.

A substantial amount of United States Government property used by the Inter-American Geodetic Survey (IAGS) was also destroyed when the Pan American Building was burned and looted (Exs. P-27, P-28). In addition, 180 United States military personnel reported loss of all or part of their household goods and possessions as a result of the rioting and looting. The value of these goods was over \$72,000. More than 100 automobiles belonging to the United States military personnel were also destroyed or damaged.

PART VI—VIOLENCE IN PANAMA CITY, COLON, AND THE INTERIOR

Damage to property of United States citizens and threats to their lives were not limited to the areas along the border between the Canal Zone and the Republic of Panama.

In Panama City rioters broke 78 windows at the United States Embassy and more at the Bi-National Center, burned the Pan American Building (owned by Panamanians), burned the Goodyear Tire Company to the ground, and looted and burned the United States Information Service

building. At Colon they vandalized the United States Consulate.

At David they ransacked and burned the Donald Dickson Company, the Chase Manhattan Bank, the USIS Mobile Unit and the USIS building.

At Puerto Armuelles there was an estimated mob of 2,000. It was necessary for the Chiriqui Land Company to evacuate to Costa Rica all its United States employees and their dependents.

At Santiago an angry mob searched the hotel for the Peace Corps doctor who had taken refuge in a shower in the manager's apartment. Friendly Panamanians took him out of town in disguise.

A gang attacked the house of an American AID advisor at Chitre who was protected by 10 men sent by the National Guard. At Penonome there was a general demonstration against the United States.

From January 9th to 13th Panamanian mobs in the Rio Hato Military Reservation tore screens from scores of buildings, mixed water with gasoline supplies, dismantled wooden siding on two buildings and gutted the Club House at the entrance of the Reservation. Later the National Guard assigned 23 men to guard United States property on the Reservation.

These numerous widely scattered acts of violence testify to the power of broadcasts emanating from Panama City to inflame Panamanians throughout the country.

Exhibit B

FACT SHEET

[Prepared by Alfred B. Fitt, General Counsel,
United States Department of the Army]

SUBJECT: Riots in Cristobal-Colon, Canal Zone

The rioting in the Cristobal-Colon area began on the night of January 9, 1964, a few hours after rioting had already begun on the Pacific side of the isthmus. The events as they occurred in the area of the Masonic Temple and the YMCA area were described in the United States presentation before the Committee established under the resolution of the OAS:

"The first indications of trouble in the Cristobal-Colon area . . . were noted at 8:00 p.m. At that time about a dozen singing, shouting persons, carrying a Panamanian flag, were observed as they marched on Bolivar Street past the front of the Cristobal Armed Services Y.M.C.A."

By 9:14 p.m., a mob of 1,500 persons had formed. The mob entered the Canal Zone, proceeded to the Panama Canal Administration Building, and raised a Panamanian flag. At this time, the mob was described as "not violent," but nevertheless "unruly and clearly affected by the action of agitators." At 9:30 p.m., the mob left the area of the Administration Building, and in a "disorderly manner," headed along 11th Street and past the Masonic Temple.

"A group of teenage girls leaving the Masonic Temple after a meeting nearly became enveloped by the mob as it moved past on its return to Colon. A retired U.S. Army Sergeant, residing at the nearby Y.M.C.A., stood by with a shotgun he owned to protect the girls. Without having fired it, he turned his shotgun over to Canal Zone police later that night. Soon after the

girls left, a barrage of rocks and other missiles was thrown at the Masonic Temple."

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"By 9:45 p.m., a crowd of about 400 persons had gathered at the intersection of 11th Street and Bolivar Avenue in Colon. Held there in check briefly by the National Guard, the demonstrators pressed on down 11th Street to Balboa Avenue. At almost 10:15 p.m., after again being briefly checked by the National Guard, a contingent of the mob surged up Balboa Avenue to a point near the Y.M.C.A. While police officers attempted to calm the forward contingent of the mob, windows could be heard being broken in Panama Canal offices adjacent to the main body of the crowd. The destruction by elements of the mob became more extensive. Windows and doors in the Panama Canal Company Office and Storage Building were broken; furniture was dragged out into the street; and pieces of office equipment were destroyed or stolen. . . . Besides the damage to the Panama Canal Company Office and Storage Building, extensive damage was incurred in the Masonic Temple and the Y.M.C.A."

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"While police were preoccupied on Balboa Avenue, other rioters entered the Cristobal Y.M.C.A. on Bolivar Avenue, looted the gift shop, destroyed furniture, and overturned file cabinets."

The commanding officer of the 4th Battalion, 10th Infantry had been alerted at 8:50 p.m., but was not given the order to move until 9:50 p.m. The order which he received from higher headquarters directed him to move to the Cristobal area, and assigned him the mission to "clear the Canal Zone of rioters, and to seal the boundary between the Republic of Panama and the Canal Zone."

At about 10:15, the battalion, consisting of about 700 men, arrived in the area of Pier 9 in Cristobal. The battalion commander went forward toward the Zone boundary to reconnoiter the situation. As described above, the rioting had already reached a frenzied pitch. In his testimony before the International Commission of Jurists, the Commander described the situation as he arrived on the scene:

"I first went to the intersection of Front Street and 11th Street; I circled back to Terminal Street, and I noticed that there was approximately 300 rioters scattered throughout the area from the intersection of Front Street and 11th, by the Commissary Building, around the Masonic Building and to the rear of the Y.M.C.A.

"I returned quickly to Pier 9, picked up Company 'A', returned to the intersection of 11th and Front Street. I had the troops to dismount, put on their gas masks, put the bayonets on their weapons, and formed into a riot control formation. The order to the Commander was to move down the right side of 11th Street, to drop personnel off sealing the border as they went.

"At this point, my executive Officer arrived on the scene. I requested that he stay with Company 'A'. I told him I would return and get Company 'B', and commit Company 'B' up Terminal Street to clear the area between 13th and 14th Street and to seal the border.

"After committing Company 'B', I returned back to Company 'A' to see what action was taking place."

Complying with the battalion commander's order, Company A had moved in column formation down 11th Street, staying within the Zone, dropping off men as they went to form a cordon sealing off the border. The Company turned

right onto Balboa Avenue, and went into the echelon formation frequently used for riot control purposes. The echelon was to the left, so that rioters forced to withdraw before the troops would be urged to retreat through alleys between the Masonic Temple and YMCA, and thence back across the Zone Boundary on Bolivar Avenue and into the Republic.

After a scuffle with the rioters, the troops continued along Balboa Avenue until they reached 13th Street. Groups of men were left at intersections to move up to the boundary along Bolivar Avenue. When the main body of Company A reached 13th Street, it faced about, retraced the route up Balboa Avenue, turned right onto 11th Street, and began to advance toward the intersection of 11th and Bolivar.

At this point, about 15 Panamanians, who had been ransacking the Masonic Temple, began jumping from the windows on the first and second floors onto the troops passing by below on 11th Street. These rioters were promptly ejected from the Zone by the troops, who then linked up with the other troops of the company who had been detached from the main body of the company, and who had made their way up 12th and 13th Streets to Bolivar Avenue. The salient formed by the Zone boundary along 11th Street and Bolivar Avenue was now sealed, and the mob cleared from the Canal Zone area within the salient. This area included the Masonic Temple and the YMCA.

The troops were now confronted with a mob estimated by the company commander to be approximately 3,000. This mob began to assault the troops with a shower of rocks, bricks, plate glass, and Molotov cocktails. Two soldiers of Company A were wounded by bullets. Others were seriously injured by the flying debris and Molotov cocktails. Once, the rioters attempted to push an automobile through the cordon of troops, but the vehicle collided with other rioters.

During these initial hours when the Infantry remained in position on the line, only tear gas grenades were used to contain the mob and discourage their attacks.

Before midnight of the 9th, Company A had sustained many injuries. The battalion commander therefore relieved Company A, pulled it back well to the rear, and replaced it with Company C. Soon after Company C took up positions, one man in the company was shot and killed and at least two others wounded by sniper fire. In order to protect the troops from the sniper fire, around midnight the commanding officer of Company C moved the company back into the Masonic Temple, the YMCA, and the Commissary Building. Company B, whose commander had been wounded and first sergeant killed by sniper fire, also fell back from the Zone boundary, and took up positions along the railroad tracks. By morning of the 10th, a third soldier had been killed by snipers, and a total of nine wounded. The troops had not yet returned fire on the snipers.

With the coming of daylight on the 10th, the rioters increased their efforts to burn the buildings on the Zone side of the boundary. Before the ICJ, the battalion commander testified.

"During the morning hours of the 10th, after from around 6:00 a.m. to 12:00 Noon, we received heavy Molotov cocktails in the vicinity of the Masonic Building, the YMCA Building and the Commissary Building."

The events of Friday the 10th are described in the OAS presentation:

"At 10:00 a.m. an attack of Molotov cocktails was launched against the Cristobal Y.M.C.A., setting the building on fire. Sniper fire hindered Canal Zone firefighters who attempted to control the blaze. Com-

pany C, which had taken up positions in the Y.M.C.A. was forced by the fire to evacuate the building shortly after 2:00 p.m., and the second platoon took up sang-bag positions in the parking lot behind the Y.M.C.A.

"The rioters then shifted their attack to the Masonic Temple, again employing Molotov cocktails. The Company was forced to move the command post from the Masonic Temple that afternoon but was able to maintain an observation post on the top floor of the structure.

"The Y.M.C.A. continued to be a target for Molotov cocktails during the day. Sniper activities continued at 12th Street and Bolivar Avenue. The barrage of rocks from across Bolivar Avenue at 11th Street in Colon resumed at 11:38 a.m. During this disturbance, a group of people ran a car up on the sidewalk at 11th Street and Balboa Avenue and set it on fire.

"A group of about 200 people in the area of 11th Street and the railroad tracks was forced back into Colon by the use of tear gas.

"The soldiers who remained in the observation post on the top floor of the Masonic Temple continued to receive heavy sniper fire for two and one-half hours in the evening of Friday, January 10th. That evening at the building of the Cristobal Credit Union, troops of Company B were faced with a group of about 50 people attempting to set fire to the building. The mob was dispersed with the use of tear gas while Canal Zone firemen extinguished the fire."

In addition to the attacks with rocks and Molotov cocktails, heavy sniper fire continued throughout the 10th and into the 11th, when two soldiers on the top floor of the Masonic Building were wounded. Finally, in the early afternoon of the 11th, the battalion commander reported

to Army headquarters that his unit had sustained an alarming number of casualties (3 dead, 15 wounded). Headquarters therefore granted permission to return fire on snipers using shotguns only. Selected marksmen were then authorized to fire on known snipers.

The harassment from stones and Molotov cocktails continued. On the morning of the 12th Panamanians throwing Molotov cocktails from the Olimpia Bar succeeded in setting fire to the second story of the Masonic Temple. Since the battalion commander had been authorized to return fire on snipers only, he did not fire on the people throwing Molotov cocktails.

In the early morning hours of the 13th, the Guardia Nacional took official control of the Colon side of the boundary, searching all houses along their side of the boundary. Hostile action in the area thereafter ceased.

The foregoing sequence of events presents a picture of the riots in two phases: the first phase began with the initial outbreak of violence about 9:30 p.m. on the 9th as the crowd left the flag-raising demonstration at the Administration Building, and demonstrators began to commit acts of vandalism along 11th Street and Balboa and Bolivar Avenues. The second phase began with the arrival of the troops between 10:15 and 10:40 p.m., when the mob violence grew until it became a pitched battle between the rioting mob backed up by concealed snipers, on one side, and the U.S. Army troops on the other.

The Chief of the Canal Zone Police in the Cristobal District in his testimony before the ICJ, stated that, about 10:10 p.m. (shortly before the troops arrived), a crowd had built up along 11th Street by Bolivar and Balboa Avenues (the location of the Masonic Temple), and had entered the Zone. He testified that "... immediately we began hearing the sounds of glass breaking ...". He went on to describe the initial appearance of the troops and their confrontation with the mob, while he and the police-

men with him went to investigate "sounds of destruction going on inside of the YMCA." He then described the scene as he entered the YMCA:

"When we entered the YMCA it was a scene of utter destruction. All of the light fixtures—the globes were broken. The furniture was broken and strewn about the floor. The water fountain had been torn from the wall and was laying on the floor and the water was flowing out all over. A steel grille gate which surrounded the merchandise section was crushed to the floor and there was a large group estimated up to 100 people running all about the place breaking things and some were carrying merchandise out the front door."

At the instant described above, the troops had not entered the YMCA, but had just arrived in the area and were occupied with the demonstrators in the street and the immediate task of clearing them out of the Zone.

The facts as they are related above may be ascertained from a reading of the United States presentation before the OAS, as well as the testimony before the International Commission of Jurists and the Report issued by that committee. A thorough examination on the sworn statements given by Army personnel who were involved in the incidents in the Cristóbal-Colón area reveals that these statements fully corroborate the public record. For example, as to the condition of the YMCA when the troops arrived, a Company C private stated, "The 2nd platoon . . . moved inside the YMCA. There wasn't anybody in the YMCA. The lights and furniture were destroyed."

In another affidavit, the commanding officer of the first company to be deployed describes how the battalion commander, having made an initial reconnaissance on arrival in Cristóbal, gave him his instructions to clear the Canal Zone of all rioters, and informed him that "... rioters had entered the Canal Zone at 11th Street and were looting the YMCA (and) the Masonic Temple . . .". The

same officer, in his affidavit, also recounts the incident wherein, as his unit passed the Masonic Temple, Panamanians armed with pipes and chair legs began jumping onto his men from the first two floors. He also states that "... the windows in the Masonic Temple had been broken from the inside ...". (emphasis added) It is evident from this other affidavit that as of the time the first troops appeared in the area of the YMCA and Masonic Temple, rioters had already entered both buildings and inflicted considerable damage to property therein.

After the troops had occupied the buildings in the YMCA-Masonic Temple vicinity under instructions to protect the property, their actions, according to all statements taken, were consistent with instructions. A captain, in his affidavit, states that he was given a message by the battalion commander to convey to the officer who had been placed in charge of the Masonic Temple. The order was, in the captain's words, "... that if the rioters attempted to enter the building with the intent to do damage to persons or property that appropriate action ... could be used ...". According to the captain, the order went on to state, "... Those people on the 1st floor could assume that rioters forcibly entering the building had the intent to do damage to either property or persons." The officer in charge received that order, and it was passed along to the men. One sergeant's affidavit names the officer, and recounts receiving the order from him. In the sergeant's own words, "The building would be defended at all costs."

Other statements by individual soldiers describe actions taken to minimize damage which the rioters were attempting to cause. Several soldiers describe throwing and firing rifle-launched tear gas grenades at rioters who were hurling Molotov cocktails at the buildings. Another describes using similar agents "to keep the crowd from entering the YMCA," while still others describe action by themselves or other soldiers in physically routing Panamanians from the YMCA after they had come in through the windows.

Exhibit C

**TRANSCRIPT OF THE UNITED STATES ORAL PRESENTATION ON
FEBRUARY 14TH AND 15TH, 1964, TO THE COMMITTEE
ESTABLISHED UNDER THE RESOLUTION OF THE
OAS/OC, FEBRUARY 6, 1964**

STATEMENT BY

**EDWIN M. MARTIN, UNITED STATES REPRESENTATIVE
ON FEBRUARY 12, 1964 TO THE
COMMITTEE ESTABLISHED UNDER THE
RESOLUTION OF THE OAS/OC, FEBRUARY 6, 1964**

In answer to a question by Ambassador Plate, Chairman of the Committee, on why the OAS Peace Commission had not succeeded in its mission, Ambassador Martin stated that there was no question but that the Peace Commission took its task very seriously and went about its work with great diligence, tact and fairness. He indicated that he had been hopeful that the agreement reached and announced by the Chairman of the Commission on the morning of the 15th of January would have gotten Panama and the United States back around the table. However, in the course of that evening, the Panamanian Government felt compelled to issue a statement that the agreement was not satisfactory and to request additional assurances. Ambassador Martin said that he did not know what factors or what pressures and arguments had persuaded President Chiari to take this position. He was sure that President Chiari was aware of the dangers inherent in a problem of this sort and in its continuance.

Ambassador Martin reviewed the efforts made by the Peace Commission to arrive at an agreement, an effort which did not succeed. He felt that they had been very close to a solution as evidenced by the agreement reached and then backed away from by Panama. He also stated that solution had been extremely close in Washington, although he admitted that he was a born optimist and possibly would not be long in the area of foreign affairs if he were not. The Ambassador declared that he cherished

the hope that, with the question and answer segment of the Peace Commission record to clarify the final agreement that the Commission had proposed, it would be possible to make clear that the delegates were not speaking just about interpretation of the treaties but about the treaty provisions themselves. He also pointed out that the final document presented by the Commission and accepted by the United States went well beyond the document agreed upon on the 15th of January and mentioned both the "Canal" and the "Treaties," while neither of these were mentioned on the 15th. He thought that the document he mentioned plus the question and answer device could provide the substance or the basis to find a formula of words, a set of sentences, which President Chiari could find it possible to sell and convince the Panamanian people that he had gotten justice for the Panamanian cause and would, at the same time, be acceptable to the United States Government. He emphasized that the delegates had been very, very close here, and it appeared to him that they were now dealing only with marginal questions.

Also mentioned was Ambassador Martin's impression that the Panamanian Government might have been looking forward to the visit of the present commission in order to resume some attempt to work out a form of language. Certainly, the U.S. would be glad to participate in this endeavour and make new proposals within this framework. Speaking personally, he stated that, from everything he could learn, he was certain that it was to the advantage of both parties to settle matters sooner rather than later. Delay would be bad for everyone concerned. He was hopeful that the occasion of the commission's presence in Panama would present an opportunity for additional work on the problem in order to get Panama and the U.S., once more, around the table. It was his feeling, he said, and some Panamanian friends had indicated as much to him, that a solution recommended by a Latin American body would be more readily acceptable to the Panamanian people than one worked out bilaterally or through any other government.

It was also made clear by Ambassador Martin that anything that could be done to promote a solution of the problem would be helpful, but that an inquiry in which past events were rehashed and charges made and rebutted, would not really be designed to calm the situation or the emotions of the people. If such a procedure were necessary, the U.S. was ready to proceed on that basis, he said. However, if a solution could be found before the topics became the subject of major public debate, the better for both sides.

FIRST SESSION

EL PANAMA HILTON HOTEL, PANAMA CITY,
REPUBLIC OF PANAMA
4:30 P.M., FEBRUARY 14, 1964

MR. MARTIN: Well, Gentlemen, we appreciate this opportunity to appear before you. We have with us today, in accordance with what we understand to be your wishes, Governor Fleming, the Lieutenant Governor whom you all met yesterday, Captain Wall of the Police force, Mr. Speir, the principal of the high school.

We propose to proceed with the Lieutenant Governor, who was Acting Governor during the day and evening of the 9th, starting in the afternoon. He and Captain Wall will talk about the actions of that day which they observed and participated in. The principal of the high school is here for any questions you might have, as is Governor Fleming. If, during the presentation, there are matters you would like him to clarify, he is entirely at your disposal.

We understand that it will be all right to make this presentation in English, but we have people with us who can translate if there are any points that are unclear.

As I indicated to you yesterday, what we propose to do is to talk and, during some of the talk, we will have slides here

of the scenes about which the speaker is talking. At other points we will interrupt briefly for a film which we think illustrates one of the points that is being made; so that the film and the slides will be mingled into the disclosure as it goes forward.

Our plan is to proceed today with the march of the students into the Canal Zone and their return and the events of the night of January 9th, both in Panama City and on the Colon side, up to the time the military took over, a time which varied, they having been called upon about 8:00, but it took time to get out of their barracks and into vehicles and on the spot. So, it runs us well into the evening of the 9th. And tomorrow, at your convenience, we are prepared to have here General O'Meara to answer questions in the same way as Governor Fleming is here today, as well as General Mabry who was the operational commander, and Colonel Sachse whom you saw yesterday on the Colon side who was the operational commander there. And, they will all be here ready to answer questions and make a similar presentation on the events of the rest of the 9th, the 10th, the 11th, and 12th, until major acts of violence ceased.

Now, before asking Lieutenant Governor Parker to discuss the specific events of the afternoon of the 9th, I thought it might be useful to sketch in very briefly the developments with respect to the flying of the flag in front of the Balboa High School which preceded the march of the students to the high school.

During the talks between President Chiari and President Kennedy in June, I believe it was, of 1962, the Panamanian representatives raised a number of specific questions on things that they thought needed change in order to improve relations between the two countries. And, it was agreed by the two presidents, as I am sure you all know, that there be set up a joint commission to look into these questions and see what kinds of practical solutions to prac-

tical problems could be arrived at. One of the questions raised at that time was the flying of the Panamanian flag along with the United States flag at a certain number of points in the Panama Canal Zone. And this commission discussed this among the very first items on its agenda. It was discussed in terms of the number of locations where the U.S. flag was flying in front of or on top of civilian installations of the Government in the Canal Zone. The U.S. representatives, the Governor and Ambassador Farland, suggested some 15 locations, I believe, where such joint flying should take place. The discussions proceeded and we began implementing this understanding and flying the Panamanian flag at additional locations where the U.S. flag was flying. The general principle which was agreed formally, I believe, in January 1963, after this discussion of possible locations, was that, in front of civilian official installations, wherever the U.S. flag would fly, the Panamanian flag would fly; and it was left to us to decide where those locations would be. Late in December '63, certain steps having already been taken at some locations, an additional list was prepared and made available. At no point in these lists were schools included as locations at which both flags would fly; and we received no indication that this was unsatisfactory.

As a matter of fact, however, when we began flying the flag at the other points and not flying either flag in front of the schools, we had a problem develop in the Balboa High School as you know. And, on Tuesday morning, January 7th, when neither flag was flown, the students decided to run up the U.S. flag. The Panama Canal authorities took it down since the understanding was that it was both or none. Later that day they again ran up the U.S. flag, and this time surrounded the flagpole with a 24-hour guard of students.

This presented a difficult problem to the Panama Canal Company authorities. Running up the flag of your country

is, certainly, a very patriotic thing to do; in this case it created a situation requiring a certain amount of political finesse. We immediately instituted conversations with various groups, including the students through the school authorities, to explain the reasons for the decision which we had taken and looking to persuading them that perhaps the best answer was to fly both flags. If they felt they wanted to have the U.S. flag flying, that was understandable but, in accord with our agreement, both flags should fly.

The Governor felt that progress was being made in the talks. When he called upon Foreign Minister Solis Thursday afternoon, I believe, just before leaving for the States, the question of the flag issue was mentioned in the conversation, and he indicated that he was trying to use persuasion measures to work this out in a satisfactory manner involving flying both flags; and Foreign Minister Solis said that this was a quite satisfactory approach to the problem.

This was the stance, with reason for optimism that within a day or so this matter would be worked out satisfactorily and peacefully. And, the Governor felt that he was free, after talking to the Foreign Minister about what problems might be forthcoming in the near future, to leave for the United States. He did so at 3:30 Thursday afternoon, and, at this point, turned over the responsibility as Acting Governor to Colonel Parker. I will ask him to pick up the narrative from there. Colonel Parker.

(Copies of maps were distributed to the representatives.)

LIEUTENANT GOVERNOR PARKER: At 4:40 in the afternoon, about one hour after the Governor had left the Canal Zone, I received a telephone call in my office that a number of Panamanian students had entered the Canal Zone and were marching past Gorgas Hospital. This was the first indication or knowledge that we had that the students planned to march. I was told that they were going past the hospital,

past the Governor's residence (photo slide no. 1). And, here is a photograph which you saw yesterday, in front of his house, the students with their banners and flags. They sang their national anthem and then proceeded on down the hill, coming on down this way (indicating on the map). And, a few minutes later the Police called me again and said, "They are headed towards Balboa High School; we must have instructions as to how to handle them because it is a very large crowd." I asked the Chief of Police to meet me in the rear of our office.

This is our Administration building (photo slide no. 2). As the students came around the building, I went here (indicating on the map) with the Chief of Police in a radio car, and I watched the students go down the steps. The students were quite well-dressed. They seemed to be rather orderly. They didn't appear to be the type who would create a major disturbance—no maleantes. I mean, they seemed to be an orderly crowd. I was very relieved when I saw that they appeared to be OK. A number of girls were with them. They went on down the steps, fairly orderly fashion; but they were saying a few things like "Yankees go home or Gringo go home" this sort of thing.

I told the Chief of Police to stop the students at the bottom of the hill below the Administration building, to stop them there and not to permit them to go to the high school—to the front of the high school—because many people had seen them come in and were starting to gather around the high school; and I was afraid that, with the signs that they were carrying and the things that they were saying, if they came too close to our citizens, trouble might develop. Therefore, I told them—the police—there were only a few police, Captain Wall and a few other police—to hold them at the base of the hill.

Captain Wall held them there. He told me on the police radio that they wanted to show their flag in front of the

high school. I told Captain Wall to hold the students at the base of the hill but to permit 4 or 5 of them to take their flag, go in front of the high school, display their flag in front of our flag pole, and permit photographs and pictures to be made so that they could show everyone that they had shown their flag in front of the high school. To explain what happened, how the students were handled, going from the bottom of the hill to the high school and back, I will turn it over to Captain Wall who is the Senior Police Captain on the Pacific side for our police force. Captain Wall.

CAPTAIN WALL: Thank you, Colonel. I arrived at this location (photo slide no. 3) where my police detail, with some 12 men, had stopped the students at the foot of the steps leading down from the Administration building. When I reached the police line, I asked for the leader of the group to come forward and talk with me. And, Guillermo Guevara Paz, about 18 years old—19, possibly—walked out of the group and approached me and spoke to me in very good English. And, I asked him what they proposed to do; and he said they wanted to go to the school and display their flag and sing the national anthem. Now, at the school at this time, we had these people (photo slide no. 4). I told him that I had been instructed to permit 5 persons from his group to proceed to the school for this ceremony, but many of the students in the group overheard this and objected. They wanted to raise their flag on the flag pole at the school. And, much argument developed among the students. Guevara attempted to persuade them—I feel sincerely that he attempted to persuade them to accept this proposal.

And, some 55 minutes elapsed while this persuasion and discussion and disorderly behavior of some of the students in the group went on. They were shouting, "No, no, no" each time he would say what the proposal was. I saw that he didn't have their attention. And, I caused a police

car to be driven to a point in front of the group, and I helped him up on the fender of the car so that he would have some elevation and be able to command their attention (photo slide no. 5); and this did seem to be effective. He talked to them at great length. As I said, some 55 minutes passed.

Finally, about 6:00 o'clock, he came to me and he said that they had agreed that 5 of the students would proceed to the flag pole at the Balboa High School, display their flag and sing the national anthem, after which they would leave. This is another picture (photo slide no. 6) that was made while this 55-minute discussion was going on. I formed the police escort for this group. And, a sixth member of the Panamanian student group joined the 5 that I had authorized, but we permitted that.

And we marched on across toward the flag pole (photo slide no. 7). When we arrived at—just before we arrived at the flag pole, this picture was made (photo slide no. 8). And, you can see a hole in the flag at this point (indicating), four fingers and a thumb. Now, this had been observed previously by some of my men. This is another picture that was made while they were enroute to the base of the flag pole (photo slide no. 9). When he arrived at the base of the flag pole, I stopped.

And, just before this picture was made (photo slide no. 10), I approached our people—the American adults and the American students—and I held up my hands, and I told them what we were going to do. I said that the National Institute students were going to display their flag by holding it by the top edge at the base of the pole, sing the national anthem, and leave. I requested our students and our adults to be quiet and respectful during this ceremony.

This is one of my interpreters (photo slide no. 11) that spoke to the students—the 6 students at the base of the flag pole in Spanish. When they arrived at the base of

the flag pole, several of their number didn't want to go through the ceremony as agreed; they wanted to raise the flag upon the pole on which the American flag was at that time flying (photo slide no. 12). I refused to permit this because I knew that we would certainly have disorder if we permitted that. One of this group, in the discussion that followed immediately after that, I left and went back over to the main body of students awaiting across Gorgona Road. He was only over there about 2 or 3 minutes; and he came back and he was pointing at the top of the pole and insisting that we permit them to put the flag on the pole.

Finally, as the discussion went on at this point, I permitted them to walk across the hedge which surrounds the flagpole and get closer to the base of the pole. Now, when they crossed over the hedge, they were within 4 or 5 feet of our students. They continued to argue among themselves. It appeared that about 3 were insisting upon raising the flag on the pole. And, I had instructed my interpreters—I had a second interpreter there by that time—to ask them to please go through the ceremony as they had agreed. This went on for about 25 minutes. And, this is my interpreter talking here (indicating photo slide no. 13) to 3 of the 6 students that were at the base of the flagpole.

Finally, when I realized that they were going to continue to insist on raising this flag on the pole and they began to shout at our students and our students began to shout at them, then "The Star-Spangled Banner" was sung by our people—the American people. The students joined in; all of the adults joined in. And, after that, it was very clear to me that it made the National Institute students quite angry. By this time, they were pressing forward toward the base of the flag, closer to our people, closer to the students. And, I realized that we might have trouble any minute. So I asked that the police line be formed between these two groups. I instructed the Sergeant to

cause his men to form between the high school students and the National Institute students.

Shortly after that I directed my interpreter to tell the National Institute students that the ceremony was cancelled. I realized that we couldn't go through with the ceremony due to the attitude of both the National Institute students and our students at that time. He asked them to leave and I asked them to leave, telling them that the ceremony was cancelled; and they refused. They continued to shout and press forward against the police line. I instructed my Sergeant in command of this police detail to push them back out of the area. And, this police detail, with the baton in front of them, started to move against them. And, I admonished the Sergeant and all the men not to rough them up.

This is one of the pictures that was made as we were moving them out from the base of the flag pole (photo slide no. 14). This is one of the National Institute students (indicating); this right here (indicating) is his trousers, his shirt, his belt here, his hand on the flag here (indicating). This is the Sergeant in charge of the detail (indicating). He had his baton in front of him, as did the others. They were moving them forward. And, as they crossed over the hedge, this man fell (indicating), and one other fell. They got up. They were struggling with the police. They were resisting violently. And they fell down again—at least 2 of them fell down again shortly after they passed over the hedge. One of my policemen picked up one of them—picked him up off the ground—and continued to move across Gorgona Road to the main body of students.

This is a picture that was made while going back across the road (photo slide no. 15), and you can see here (indicating) the flag wrapped around this person here (indicating)—quite a bit of strain on the flag at that time.

This is a picture that was made as soon as the 6 students arrived back across Gorgona Road in front of the students

that had been waiting there for them (photo slide no. 16). And, they are now showing the torn flag to the other students. And, you can see by the expression here (indicating) that this student is quite angry. They were angry; they were shouting. And, by this time all of the students were shouting and abusing me for permitting this thing to happen over at the base of our flag pole. At that time a policeman that was standing within about 5 feet of me was struck with a stone on his helmet liner which made a hole in the liner about the size of a half dollar. The students that had been at the base of the flag pole moved into the main body of students. About 2 or 3 minutes elapsed; and then they all broke and ran as if commanded, as if they all agreed on this.

OAS AMBASSADOR: Can you tell us where did the stone come from?

CAPTAIN WALL: It came from the direction of the students because we were facing the students, and it hit him in the forehead.

They broke and ran up the hill in the direction of the steps that lead to the front of the Administration Building.

LIEUTENANT GOVERNOR PARKER: Would you explain that the flag was torn—

CAPTAIN WALL: Yes. On the way over, when the 6 students came through the police line, one of my sergeants saw that the flag was torn; and he tried to find a pin—tried to assist in the pinning of the flag. He even offered to use his pin on his shoulder, on his sergeant's chevron, to pin the flag.

LIEUTENANT GOVERNOR PARKER: Did you see any of the Americans touch the flag—or try to get hold of the flag?

CAPTAIN WALL: None of the police officers touched the flag. I saw no American touch the flag. No student—no Balboa High School student touched the flag. The only

possible contact with the flag by our people was—in pushing back against these students with their batons—and they were struggling—it certainly is possible that this flag touched the baton or touched their hands as they moved backward. But, I was following right along behind this police detail. It was a very tense situation. I chose to be right there with them all the time.

LIEUTENANT GOVERNOR PARKER: We have a film that summarizes—that shows the same action on film. I'd like to have Mr. Baldwin narrate this film very briefly.

(A movie film was shown; Mr. Baldwin narrated in Spanish. See attachment 1.)

LIEUTENANT GOVERNOR PARKER: I wanted to point out those two flags because we have been flying the Panamanian flag and the U.S. flag at our Administration Building for a long time. They are in full sight of the high school—within 150 or 200 yards—so that they cover the entire area there—and have been flying for a long time.

When Captain Wall returned the students back to the base of the Administration Building, I had hoped that we could get the students out of the Canal Zone very promptly, with no difficulty. So, I had arranged for 3 large buses to be waiting for the Panamanian students when they came back from in front of the high school. We offered free transportation to the students in an attempt to get them back to Panama without causing any more encounters. They did not accept the transportation.

Instead, they turned and ran up the steps of the Administration Building—most of them—some of them went around—most of them ran back up this way (pointing on the map) and on back this road (indicating); a few went around this way (indicating). I was standing by the building here (indicating); and the students came back by me. A group of them tried to take down the American flag which was flying at the building, but they were prevented.

from doing so by some of our civilians who stood around the flagpole. They then continued in around my office building, broke windows in the office building as they went around the corner. I went to my office with our Chief of Police and a police radio to listen to the action as they went back up the road (pointing on the map)—as they went back up the road. We all thought that we had been successful in avoiding an incident because we had had no clash between the two people. We were very relieved that it had gotten off without anybody being hurt, and that the students were going back.

But, as soon as they went by the Governor's house on the way back, the students started causing more damage. They started breaking all the street lights. They threw stones at automobiles. They stopped a woman who was driving an automobile—an American woman—got around her car, said, "Kill the Gringa", started shaking the car; and another car coming up behind her honked his horn and they left. They broke windows in the hospital—in the maternity ward of the hospital—as they went back out. And, as they went by the new hospital building here (indicating on the map)—as they went by this area, they climbed up on the roof here (indicating), threw down timbers, pieces of steel, cement bags, picked up pieces of timber and other objects on their way back out of the Canal Zone.

As soon as we heard that the students were causing damage, I asked the Chief of Police if the Panamanian authorities had been contacted for help. He said that he had told his liaison man to contact the appropriate Panamanian authorities to let them know that the students were causing difficulty and that we would like to have their help in taking care of the students as they got back outside the Canal Zone. The students were breaking these windows, stopping cars, doing this damage. There was a question as to whether we should arrest some of them; after all, they

were causing a fair amount of damage. The Chief of Police and I discussed this—shall we arrest some of these people and pick them up, because this is not a very pleasant thing? But, we decided, no, get them out of the Canal Zone, no incident. So, we did not arrest or touch any of the students.

The police continued to follow them, and the students walked on out. When they got to this point (photo slide no. 17), it was getting quite dark, as they got back near the Canal Zone boundary; this is how dark it was (indicating), about 6:30 at night. We stopped here yesterday with the bus. This is a street in the Canal Zone (indicating); Panama is over here (indicating). See this student (indicating). This is one of the students who was down around the flagpole. This is a big log (indicating) which he picked up by Gorgas Hospital. He later threw this log through the window of a car with a woman driving it, shattered the glass, and it ended up in the back seat—in the Canal Zone.

The same time (photo slide no. 18)—this is in the Canal Zone (indicating); Panama is over on the other side of the street (indicating). This is a traffic light (indicating); these same students as they left the Canal Zone, throwing rocks against the traffic light. More of them (photo slide no. 19)—these same students. Next morning (photo slide no. 20)—this is the traffic light that they knocked down (indicating). This is some of the debris that they left as they went out (indicating on projected photo slide). This is a school (indicating on projected photo slide)—a grammar school in the Canal Zone—Ancon School—this was painted on the wall that night (indicating)—this is the next morning.

When the students finally got out of the Canal Zone about 20 minutes of 7:00, I still thought that everything possibly would be all right. We were continuing to call the Panamanian authorities. They assured us that they were send-

ing people up to help control the students. The students went back to the Instituto Nacional—back into their building—very briefly—right back here (indicating on map). And, I thought everything probably was all right. And then, the first report of fires—they took a car—overtaken a car and set it on fire in front of the Judge's house. This was about a quarter of 7:00—right here (photo slide no. 21)—shortly after the students left the Canal Zone—in front of the Judge's house. This car set on fire (indicating)—this was the first one, right here (indicating), and then this one (indicating). Our police then, who had followed them out, said that the crowds were starting to form as the students then came back out of the Instituto Nacional; that people were forming on the street; they that were carrying Molotov cocktails and appearing from the school with many rocks; apparently they had obtained a lot of rocks inside the school.

I called Quarry Heights, our military headquarters, at 10 minutes of 7:00. I said, "It looks as though there may be trouble along the boundary." I explained what had happened with the students. I asked that the troops be alerted so that they might be called—might be obtained in a hurry if we needed them. I then called the American Embassy, at 5 minutes of 7:00, shortly after the students had left the Canal Zone. I spoke to the Staff Duty Officer in the American Embassy—the Chargé d'Affaires was not there—I asked him to call President Chiari immediately and deliver a formal protest from me as Acting Governor of the Canal Zone; that Panamanian students had caused considerable damage in the Canal Zone and were burning cars and destroying property within the Canal Zone right then; they were starting to throw rocks at all the cars going up and down 4th of July Avenue.

Then, for a few minutes after 7:00 o'clock, it appeared that things had quieted down. The activities stopped briefly. I called Quarry Heights, the military command,

and said, "Maybe it will be OK. Maybe our police can handle it, and the Panamanian authorities have told us that help will be coming, but still keep the troops alerted." In a few minutes the situation got much worse. They started tearing down the fence along 4th of July Avenue. From experience in previous riots 4 or 5 years ago, we had built a fence along here (indicating on the map). They started tearing this fence down. More cars were being burned. I got reports on the police radio, to which I was listening—Captain Wall reporting and others—that more and more people were coming out in the streets.

I talked to General O'Meara on the telephone and told General O'Meara that the situation appeared, from the radio reports, to be extremely serious, and it would probably be necessary to call in the troops. He said, "Please use the police as long as you can and see if you can contain it and handle the situation." I said, "Before asking that troops be used, I will personally inspect the border and see what the situation is." So, I got in a car at a quarter of 8:00—one hour after the students had left the Canal Zone—and went to the Tivoli Hotel—along in here (indicating on the map)—very dark, a great deal of confusion. Many Panamanian cars had come and parked in the Canal Zone so that they wouldn't be destroyed rather than leave them on 4th of July Avenue—many cars with Panamanian licenses—to get them out of the way—many people running back and forth, trying to climb over the fence. I drove up here (indicating on the map); my car was hit with a rock. There were many rocks on the road. People were trying to climb over the fence to the Tivoli Hotel. All along here (indicating) I could see from here (indicating) down here about 5,000 or 6,000 people. I could not understand how they had formed so fast, where they had come from this fast, because the sidewalk was packed with people. There were many people in Shaler Plaza. Yes, this is an indication (photo slide no. 22). This is a little bit later. But, as we looked along, we saw people

like this (indicating), many of them moving in many directions, and no apparent—one particular point they were going. This is opposite the Tivoli Hotel, right about here (indicating on map)—people in Shaler Plaza in the Canal Zone destroying and attacking our bus terminal, taking the bus terminal in the Canal Zone apart.

In spite of the fact that there were fires present along the boundary line, there were no bomberos present—no firemen coming to put them out—except our own fire trucks that were then trying to come out to put out the fires in the Canal Zone. By that time—by the time I was at the Tivoli Hotel, we had made 7 calls to the Panamanian authorities to ask for assistance along the boundary in controlling Panamanians. Several times we had been promised that help would come. But, at a quarter of 8:00 as I stood in front of the Tivoli Hotel, there was no indication of any assistance from the Guardia Nacional or other Panamanian authorities. This convinced me that there was going to be no assistance in handling this tremendous crowd which had grown up.

I would like to say a few words about our police force. We have in the Canal Zone a small well-trained police force. Its purpose is to preserve law and order in the Canal Zone. We only have about 180 for the entire Canal Zone—both sides, Atlantic and Pacific, and in the middle as well. In the Balboa District on this side of the Canal—on this side of the Isthmus—in the entire district, we had on duty when the Panamanian students entered in, 20 policemen. We started calling policemen back to duty, getting them at their house, the restaurants, wherever they were, telling them to come back, it looked like we might have trouble. By the time the students left the Canal Zone, we had 40 policemen. By the time I got to the Tivoli Hotel, every policeman we had in the Canal Zone on this side was on duty—80 policemen.

I saw myself 5,000 to 6,000 people in one location along here (indicating), and I knew others were forming here

(indicating on the map). It was quite apparent to me that our police would have a lot of difficulty in handling these crowds with this number of policemen, with no assistance from Panamanian authorities. The crowd at that time was coming right down here (indicating). I was sure—I was positive that, within a very few minutes, the crowd would have surrounded the Tivoli Hotel in which we had many people—many old women as well—we have a number of elderly women who live there. And, this is a large housing area (indicating), with large families—women and children, particularly—this is a large-family area. And, the Panamanian crowds at that time were within several hundred yards of this housing area. With this situation, I went immediately to General O'Meara in my car, reported to General O'Meara that I was unable to maintain law and order in the Canal Zone with the civilian authorities—with the police and our own firemen. I requested that he assume command for the purpose of providing military assistance in maintaining law and order in the Canal Zone.

I would like to show you a brief film here of some of the scenes of that night—some of them are about the same time, very early, about 8:00 o'clock; others are a little bit later during the evening. But, to give you some idea of what it looked like at this time, I would like to show this film and have Mr. Baldwin explain it. (Mr. Baldwin narrated in Spanish during the film showing. See attachment 2)

LIEUTENANT GOVERNOR PARKER: I would now like to cover for you, with the help of Captain Wall, who saw much of this myself, some of the major areas in which we had difficulty with the Panamanian crowds within the Canal Zone. I am going to cover a few of these areas; they are marked on your map. You saw many of them on the ground yesterday. I would like to start first here at the Tivoli Hotel (pointing on the map), an area of major concern to us.

CAPTAIN WALL: It was about 7:30 when this mob in front of the Institute on 4th of July Avenue marched toward the Tivoli Hotel. They arrived there about 7:35 or 7:40. I moved to the Tivoli Hotel at that time, and I was looking down on Shaler Triangle. I saw 2,000 to 3,000 demonstrators down there. People were coming from all areas of Panama into the Shaler Triangle area. I had 8 policemen at this location.

About 8:40—pardon me, 7:40, about 50 persons from the mob down in Kennedy Avenue tried to come over the fence in the lower parking circle in front of the Tivoli (photo slide no. 23) and the police detail at that time used tear gas. They threw the tear gas down along the fence and repelled the attack. Then the mob started surging toward the laundry and toward the freight house. When they got to the freight house, they turned over this car—pardon me, to the laundry, they turned this car (photo slide no. 24) and set it on fire.

LIEUTENANT GOVERNOR PARKER: This was about 100 yards—150 yards in the Canal Zone.

CAPTAIN WALL:—about 150 yards in the Canal Zone. A mob of about 200 persons broke away from this large body of people that were completely filling President Avenue at this time. I estimate the crowd at about 3,000. About 200 persons broke away from this group and marched up Frangipani toward the residential section. This photograph shows the Panama flag and some of the persons as they came around this building from their group or from the main body of some 3,000 persons who were over on President Kennedy Avenue. We had 4 policemen at this particular location, at that time. They used their teargas—the remaining teargas that they had. They had been in action up at the Tivoli with teargas; and they had come down here following this group. They used all of their teargas and repelled these people for the time being. Now, the residential section is about 150

yards from the point that these demonstrators marched. They had come up to a point about midway of the Sanitary office before the men used the gas and caused them to retreat (photo slide no. 25). Now, at this time Molotov cocktails were being thrown into the laundry. The laundry is right here (pointing on a projected photo slide). A car was on fire here (indicating); you can see it burning, down on Frangipani Street in Panama—right here (indicating). The railroad coach—one of several railroad coaches that were spotted on the railroad track opposite the railroad station which is immediately the other side of the laundry here (indicating)—was later set on fire; within 10 minutes after this action, the railroad coach was on fire. Another car was pushed into the laundry here (indicating) and set on fire. We had 2 cars in there on fire. We had the railroad coach burning. We had Molotov cocktails thrown into the freight house to which is about opposite the point where this car is burning here (indicating). I went around to the Roosevelt Avenue side of the laundry. I had 8 policemen on Roosevelt Avenue facing this mob. The mob came into the Canal Zone, up Roosevelt Avenue opposite the railroad station, broke into the railroad station, looted the railroad station, tried to burn it; and at that time they set fire to the coach that I have just mentioned.

I spoke of these "Molotov cocktails." I have one here (displaying a sample). We had all kinds. Just about any bottle that could be found that would hold liquid was used as a Molotov cocktail. It just has a wick: they fill it with gasoline and light it and throw it.

At 9:30 p.m., I heard on the radio that an attack was being made on the District Judge's house by the mob that, by this time, had torn down the chain link fence that extends from "J" Street all the way up past the District Court. They had torn this fence down. They were charging up the hill, throwing stones. They had thrown 3 Molotov cocktails—2 into Judge Crowe's house and 1 underneath his house. The police at that time fired into the

air to cause these demonstrators to retreat in order to permit the fire truck to come in to put out the fire. The fire truck had come in there; there was a hail of stones; they stopped. The police, by firing over their heads, had caused them to retreat; and then the fire department got in and helped Judge Crowe who was in the house himself and the policemen, who were in there trying to help put out the fire. The fire department came in and put out the fire.

LIEUTENANT GOVERNOR PARKER: I would like to add that, for firefighters, we use Panamanians, for the most part; we have some U.S., but, basically Panamanians. I, personally, saw many of them in action that night, and they performed very bravely under a heavy hail of rocks, all the way through; there were many brave feats on the part of the firefighters.

CAPTAIN WALL: Shortly after 9:00 o'clock I received reports on the police radio that there were some 1,500 to 2,000 demonstrators on Fourth of July at Balboa Road. I immediately went to that location. I had a Sergeant and 9 men at this location facing some 1,500 to 2,000 demonstrators that had tried to penetrate the residential section of Balboa by going up Balboa Road to a point about 150 yards from the police booth. Now, the police booth is about 100 yards from the intersection of Balboa Road and Fourth of July Avenue in the direction of Balboa. My men at this location had stopped this advance into the Balboa residential section by use of revolver fire over the heads of the demonstrators. I assessed this situation, and I immediately called for assistance. And, at 9:17, one of my squads was relieved over on Roosevelt Avenue; and he, the Sergeant in charge of this squad, took 10 men and reinforced this squad on Balboa Road. That gave me 2 squads on Balboa Road.

I was still quite concerned about this situation. The demonstrators had come upon the hill because we have a

hill there—we call it Reservoir Hill. They had gone upon this hill and were rolling rocks down the hill onto the police detail; and they were stoning them. And, the Sergeant in charge of this detail reported to me that he heard sniper fire; they could hear the bullets zing over their heads; and the noise of the report was coming from down in Panama. The gas line was set on fire. The grass on Quarry Heights reservation was set on fire by these people. They tore down the police booth—they tore the roof off the police booth. They tore the roof off the bus shelter at this location, and they used it to barricade themselves on Balboa Road opposite the police booth. Now, my men were about 100 yards up Balboa Road from this point when I arrived there to inspect the situation.

LIEUTENANT GOVERNOR PARKER: Notice we can come back if you would like to have more questions on these areas. I am trying to get around and cover the whole thing. Those were the major areas in which, on the Pacific side, our police were involved with the mobs within the Canal Zone.

I would like to summarize very briefly what happened in Cristobal. Nearly everything that happened here, Captain Wall saw, and I heard on the police radio. My knowledge of Cristobal is only based on the reports of our police, and I will give that very briefly. You saw much of this yesterday. This is Colon and Panama, Cristobal within the Canal Zone, boundary here (pointing on the map).

About 9:15 a large crowd of about 1,500 Panamanians came in here (indicating on the map) to our headquarters. We fly 2 flags at this headquarters, have for a long time. It is our major headquarters on the Atlantic side. We fly the U. S. flag and the Panamanian flag. They were both down at that time; it was night. They raised the Panamanian flag—the crowd raised the Panamanian flag at this building, marched around it, came on out. Our police did not interfere with this parade, did not touch anyone,

talked to them in an effort to keep them quiet, and they went on back out after an hour, with minor damage—broke a few windows. Then the crowds formed about in here (indicating on the map) and started coming again into the Canal Zone. They broke in that same night—about 10:00 o'clock they broke into our big building over here (indicating), our old commissary building that we have many of our offices in. They actually went into this building, took out furniture, safes, files, cabinets, broke the windows—took it out in the street and threw it in the street. They broke into the Masonic Temple and did the same thing. A crowd also attacked the YMCA building, a private building—not Government—used for meetings, the Rotary Club, Lions and others, used by Panamanians and U. S. alike, but in the Canal Zone—broke into this, started looting it, taking out property, files, burning it; and, our police and military had to go into that building and eject them. They were able to push them out. That night then sniper fire started along here (indicating on the map); and our police pulled out, I think, around 11 p.m. and left the military in charge along the boundary. But, our police did not fire any shots in Cristobal the first night. We fired no weapons over here, although weapons were fired against us, and although 3 of our main buildings had been looted. Later on, in the days that went ahead, the next 3 or 4 days, these buildings were reattacked and were burned, and 2 of them are almost completely destroyed, as you know. One reason we did not fire or find it necessary to fire on the Atlantic side is that we had some assistance from the Panamanian authorities. Their people—Guardia Nacional and some of their other representatives assisted in attempting to handle the crowd, although they were not completely successful. One of our fire trucks, early the next morning, that came down here (indicating on the map) to try to put out a fire, before we had fired a shot, got 3 or 4 bullet holes in it, rapid fire into our fire truck. I believe more information on this will be furnished you because most

of the story over there after the first night, as it is here, others can tell you better than I can.

I didn't summarize—I possibly should summarize for you very briefly—say just a word about the instructions that our police have on handling mobs, and the training that they have had. Captain Wall, would you just very quickly summarize the training and summarize the steps that we normally go through in handling a crowd of this sort.

Captain Wall: Our men are well trained in riot control. They have had a lot of experience. In 1960 we had Dr. Joseph B. Lohman come here to the Canal Zone and lecture on mob psychology and crowd behavior. Immediately prior to that, we had conducted a very comprehensive course in riot control. And, since that time, we have repeated that course to all new policemen. And, we have had refresher training to all those who took the course in 1960. Our instructions to our men—and this is covered thoroughly in the training—is that, to quell a disturbance, first you use water or you use teargas. If that is not effective, then to protect life, you may use firearms. First, if you use firearms, they are instructed to fire over the heads of the demonstrators. If this is not effective, they fire into the ground—and I don't mean into the ground in front of the demonstrators necessarily—they fire into the shoulders of the road. And, as a last resort, when the demonstrators are moving into residential sections where life is in danger, they fire into the pavement in front of them or they fire into the ground in front of them. And then, finally, as a final resort to protect life again, they may fire at the demonstrator.

Lieutenant Governor Parker: Was it necessary to fire at them that evening, on Friday night?

Captain Wall: On January 9th and subsequent to that time, it has not been necessary to fire into the crowd. And, I have found no evidence in my exhaustive investigation

that their instructions were disobeyed or that they failed to follow their training in this respect.

Lieutenant Governor Parker: Sir, that concludes our summary that we have of the events.

Mr. Maintain: I'd just like to add three points to this factual survey. First, I think it is important, in the light of some things that have been said, in appraising the decision of the police authorities in those few occasions when they had to take this decision to fire over the heads or into the ground as a last resort—that we appreciate the situation they were in. They had been called together hastily, from restaurants and homes, to meet an unexpected crisis. They had used up the teargas that was available to them. Communications were in a difficult state in the Canal Zone. And, they had no other means at hand to deal with the public, as the firefighting equipment, the hoses, were all busy fighting fires.

Moreover, they were not dealing with a mob coming in peacefully to plant a flag. They were dealing with a mob which had set fire to property in the Canal Zone, had set fire to their own property in Panama. They were a mob out of control, not rational in what they were doing. It was a mob which was throwing stones, was throwing Molotov cocktails. It was a mob which had attacked one dwelling, namely the dwelling of Judge Crowe. Therefore, there was every reason for a police officer, exercising his responsibility for protecting life of American civilians, to assume that, if this mob was allowed to proceed to the area in which people were living, there would be loss of life as well as property. And, in every case in which they did find it necessary to fire their weapons over the heads or, in one or two cases, into the ground in front, the mob was within a relatively small number of yards of residential areas which had no fences or other protection, no obstacles to be surmounted, except a very small number of police. It was in this situation, defending against this kind

of aggressive action in our territory that these steps were taken.

A second quite different point—there has been quite a bit of discussion about the student march into the Canal Zone, as to whether this was a planned operation or a spontaneous demonstration of patriotism. We, I think, on the U. S. side, are not in a position to have authoritative inside information on this point. However, I think there is one passage that is of interest which should be, if it is not already, in the records of the committee. You will recall that, when the Police Captain called upon the leader of the group to step forward, it was a gentleman named Guillermo Guevara Paz that stepped forward—and you saw a picture of him up on top of the fender of the car arguing with the students about what procedure should be followed and trying to persuade them to follow the procedure that had been suggested by the Captain. This same student wrote an article on January 14th, which appeared in the *Estrella de Panama*, and I'd like to read a couple sentences in an English translation from this article. He said:

"I interviewed the high school students that were guarding the flag. They informed me they did not have any objection for both flags to be flown jointly; that their only concern was to have their flag in front of their school. This seemed to be a reasonable request, and I so informed my companions, the organizers of the manifestation to the Canal Zone on the afternoon of Thursday."

In other words, he referred specifically to "organizers" of the demonstration. And, to continue with the quotation,

"About 3 p.m. Francisco Diaz, Secretary of the Federated Association of the National Institute, obtained written authorization from the principal of the school, Professor Diegemo Real, and he gave the authoriza-

tion as well for the flag that was used in the student movement of 12 December 1948."

Now, this, I think, is interesting, indicating that, as far as he was concerned, there was advance organization and preparation for this march.

Lastly, one of the problems that I think has puzzled many of us who have been concerned about this whole incident—what seems in retrospect and seemed to the Acting Governor at the time to have been a march of students which might have erupted into violence within the Canal Zone but that seemed to be ending with their marching out with a certain amount of property damage but apparently peaceably in terms of clashes between people, there developed in the course of the night into a very uncontrolled mob, attacking Canal Zone property and Panamanian property as well. It developed very rapidly into a very large crowd, well equipped with rocks and Molotov cocktails. I don't know what the full story is on how this moved as rapidly as it did and what inflamed the feeling as strongly as it did for people to take the kinds of irrational actions which were taken. But, I think that there is evidence that some individuals, who had positions of authority with information media, did everything they could to see that what was an incident, almost under control, should get out of control. We have taken just one radio station and recorded some of the things that were said over that radio station between 7:30, when the mob was forming, and 11 o'clock that night—or midnight that night—to the Panamanian people, which may have been among the things that was responsible for the outburst of emotion which took place. This is in Spanish. We'd like to run—I think it's about a 5 or 6 minute tape of things that were said on this station. I would just call attention to two kinds of things—one is editorializing, if you may say so, expressing opinions about what ought to be done to the "gringos" and they are fairly strong statements; the second is a gross misrepre-

sentation of facts. There is reference to airplanes threatening Panamanians. There was one 2-seater airplane with a loud speaker which flew up and down asking Canal Zone residents to return to their homes and people, who were not Canal Zone residents, to return to their homes, to try to keep the damage to life at the minimum. This was essentially like a Piper Cub, one of the smallest planes we have in the service.

There were references to tanks in place to fire, and cannon firing. There were no tanks anywhere near the boundary during this period; there were no cannon. And these, obviously, were mis-statements of facts which had the effect of inflaming people's feelings. Whether they were designed so, you will have to read into the motives of those who said them; but they certainly would have that effect, I would think.

(A tape recording in Spanish was played. See attachment 3)

Mr. Martin: I don't know how much of that was really understandable, but we have a transcript if it would help. I think this is all we have to present in today's presentation, but we do have the principal of the high school and, of course, the Governor, if there are any questions that you would like to ask. All the rest of us are also available for questions. Mr. Chairman, we are in your hands.

Chairman: Did you know that the Panamanian students were coming and at what time?

Mr. Speir: No, sir, I did not.

OAS Ambassador: Had you been there the moment that the students arrived?

Mr. Speir: Yes, sir, I was present when they arrived. We did not know they were coming until they arrived.

OAS Ambassador: There were many students Americans?

Mr. Speir: Not at the time that they arrived. After they arrived—after the Panamanian students arrived, many students and adults then came to the campus. At the time that they arrived, perhaps not more than 25 students were still around the school. School was dismissed at 2:45, and this was about 4:30. So, almost everyone had gone home then.

OAS Ambassador: Do you have something that you would like to add?

Mr. Speir: Not particularly, sir. I think it has been very well covered. I would be most happy to answer any questions.

OAS Ambassador: Mr. Principal, I would like to add a question. One of our witnesses we have had has stated that the day before this incident started, that means the 8th, a delegation of 2 or 3 students went to see you and let you know what they were planning, to have this kind of ceremony before the school, and that you were aware that they were going to do that—they were going to do that—and that you sent them on to talk with the public relations—to see Mr. Baldwin. I would like to know if that is correct.

Mr. Speir: It is absolutely incorrect. Three students visited me in my office on Wednesday, Guevara Paz and two others whose names I do not know. They said they were reporters for the school newspaper—Instituto Nacional newspaper. They asked me some questions about the flag. They said they'd like to get an article for their school newspaper. When they said they wanted an article for the school newspaper, I referred them to the Public Information Office, called his office—Mr. Baldwin's office—arranged an appointment for them, showed them how to get there because it's right in sight of the high school, and they left. That was the extent of the conversation. There was no mention at any time, even indirectly, of anything planned, as far as coming back the next day.

OAS Ambassador: When did you see them, Mr. Baldwin?

Mr. Baldwin: When the students came to my office, they wanted to know what was going on in the Balboa High School. I explained to them about the joint communique that had been issued by the two governments pertaining to the flags of the United States and Panama. I also explained to them that the schools were not to be included as to having both flags. Then they asked me—why did the students insist on having the U.S. flag up; and I answered to them that they were just as patriotic as they, the Panamanian students. But, at no time did they tell me that they were coming into the school on a march or planting the flag or anything like that. All right, that's all.

OAS Ambassador: Apparently a letter appeared in the *Washington Post*, in one of those letters to the Mail Box—a letter to the editor—just a statement that some ex-student from down here—somebody had written a girl living in Arlington stating that there was some type of atmosphere at the school—that something might happen between U.S. and Panamanian students; that something would happen in those days; that the things were boiling in the school itself. Was there anything done by the authorities in the school, talking about peace to try to soften up between U.S. and Panamanians in the school?

Mr. Speir: Number one—I find it difficult to comment on a letter that I have not seen and don't know the contents of. If the letter stated that there was animosity between the American students and the Panamanian students in Balboa High School—

OAS Ambassador: Well, it's due to the flag question.

Mr. Speir: —due to the flag or any other question. I can say that that is false. There was no animosity between the U.S. and the Panamanian students within Balboa

High School. I think this is demonstrated by the fact that our Panamanian students—tuition students—have returned to Balboa High School immediately after school was resumed, and there has been no animosity.

Mr. Martin: How many do you have?

Mr. Speir: We have about 75 at the present time—about 75 Panamanian students in Balboa High School. There are about 300 Panamanian students in all of the schools. As you know, they are on a space available basis.

Mr. Martin: There was another question on what you did. Didn't you have teachers making speeches—Governor, wasn't there some program of this sort?

Mr. Speir: This was after school resumed on the 15th, in response to Governor Fleming's talk to us on the 14th. The 14th of January was the day before classes resumed on the 15th.

Lieutenant Governor Parker: I think it might be well, if I am in order, to amplify the question that he has asked—if you would comment, Mr. Speir, on the extent to which this flying of the American flag at Balboa High School was supported by the numbers of students involved, and who they were, and what attempts you made yourself to calm this situation down or to take care of it, knowing that you had a problem in your school. I think this was really the question that he is getting at. Would you comment on who was involved in this and what you were able to do about it within the school.

Mr. Speir: Balboa High School has 1,850 students; it is a large high school. At no time were there more than 150 to 200 students in the area of the flag pole. This means per se that most of the students did not involve themselves in this issue. While classes were going on, we made a very careful check of the attendance, during this period; our absenteeism was only slightly—1% or 2%—slightly higher than a normal school day. Most of the time—all of

the time a minimum of 1700 of these students were right in the classes doing what they should be doing, learning.

Our feeling was that this was a protest demonstration. Once the protest had been made, the point would have been made, and then a solution would be found—either the flying of two flags or none. Governor Fleming made it very clear that the decision as to the number of sites was not final and absolute and could be revised if the people so wished.

We were concentrating our efforts on those who were doing the actual agitation. I would like to make it very clear that it was a positive demonstration; it was not a negative one. By that I mean this, at no time was there a demonstration against flying the Panamanian flag at Balboa High School. I saw not one time, not one sign, not one petition; I heard not one speech about flying the Panamanian flag. The students wanted the flag of the United States flying in front of their school. Remember that it had been flying there as long as they had lived. This is what they had wanted. They were reaching a point on about Thursday—because if you are in this business, you began to be able to know what is going on within a school. It was clear to me by Thursday that the solution would be flying the two flags.

OAS Ambassador: Only a few students—not more than 150 out of the 1800 were involved in the flag question; the rest of them attended their classes.

Mr. Speir: This figure of 150, of course, is a maximum figure.

OAS Ambassador: When was the order out—had the flag been flown previous to this time only—this practice of flying the American flag.

Mr. Speir: It had been the practice to fly the American flag for as long as we had had a high school at Balboa or any other site.

OAS Ambassador: We have always been informed that, at Balboa High School, there had always existed absolute discipline on the part of the students with regard to obeying directives, orders, and so forth, from the authorities. However, we have also been informed that, at the particular time in question, there had been noticed a slight drop in this obedience and this discipline, and the initiation of a subversive type movement with regard to the question of a certain small group of students who wished to raise this flag in contravention of the orders that were given, possibly based on the fact that this was the time that orders had been given for the flying of the dual flags in a certain selected number of sites. I want to know if this was true.

Mr. Speir: I'll have to be very sure what the question is. I am flattered by the first part of the question; I accept that and appreciate it. Balboa High School has been noted for its firm discipline because, frankly, I believe in that. One cannot learn in an atmosphere unless there is peace and quiet and dignity. Exactly what is the question now in regard to the second part?

OAS Ambassador: It is true that, at the particular time in question, there was a movement among a certain group of students with regard to the raising of the American flag at the school, taking into account the fact that, at this particular time, the dual flag order was going to be placed into effect—let me rephrase it. They gave the consideration that discipline was very good. It sounds surprising that the number of the students that had disobeyed the orders and decided at this moment to fly the American flag there, and to keep it even against the directions given by you or by the Governor. So, how can you explain that?

Mr. Speir: I see. I'll come to yours in just a minute. If the question is, did a group of students use the flag issue to subvert discipline, then my answer to that is, I do not believe so.

Mr. Martin: Did it subvert discipline on the flag issue?

Governor Fleming: I would like to answer your question. I think the question is, did some students disobey my order. I never gave an order to pull the flag down. The question came up, as to whether I should issue an order to lower the flag. I decided myself I would not do that. I never issued any order that they should lower the flag. What we were trying to do was to work against time. We were working on the parents. We were working on the student leaders. We were working on the people who formed public opinion in the community because it was my opinion then and, frankly, it would be my opinion now that, had I ordered that flag down, I would have greatly aggravated a delicate situation. So, there was no order—there was never any order to those students to take their flag down.

Chairman: Well, the question mostly is, did you notice any feeling or emotionalism, spiritualism, in the students pertaining to the flag issue. There are two things—one is bringing the flag down or bringing the two flags up—was there any emotionalism—were people saying, "Well, we don't want either flag or one flag down" or anything like that?

Mr. Speir: No. As a matter of fact, there was an atmosphere of calm. Remember now,—the directive was issued on December 30th. We returned to school following the Christmas holidays on January 2d; we were in school January 2d, January 3rd, and January 6th. No flag was flown at all. There were no demonstrations. There was no atmosphere of emotionalism. There was no tension. Then there were rumors to the effect that the students would attempt to fly the flag the following day, Tuesday, January 7th. But, I recall on Monday, January 6th, in making my tour of the plant, which was a very large plant, being struck with the idea of how peaceful and how calm the school was. Of 1850 students in school during that

tour, I found exactly one student who was some place where he should not have been. One can feel when the air is charged with emotionalism; definitely, it was not.

Mr. Martin: There were a small number that were determined, and did put up the flag and sat guarding it 24 hours a day—starting when?

Mr. Speir: —starting on January 7th, Tuesday, this is correct.

Governor Fleming: Getting back to this flag issue—in the discussions, which the American Ambassador and I had had with the Panamanian representatives about flying the flag, we agreed that there would be about 15 locations in the Zone where the two flags would be flown. The Panamanian representatives knew where those locations were. We had discussed it with them in general, and I think there was an acquiescence on the part of the Panamanian authorities where the flags would be flown. We were going to fly them at Gatun Locks and Miraflores Locks; on each end of the Canal; at the two Administration buildings; we had one set of flags in each of our major townsites; one at each of the hospitals, there are four hospitals; and one at the two cemeteries. But, initially, there was a total of 15 locations; and then we added 2 more, making 17 locations for the flags.

The American schools and the Latin American schools—because we have two classes of schools in the Zone—we have American schools which we teach in English; and we have Panamanian schools which we teach in Spanish. The majority of the students at the Panamanian schools are, of course, Panamanian citizens who actually live in the Zone, and the American Government runs the schools for them. And the question came up about flying those flags at the schools—what kind of flags we were going to fly at the schools. So, we made the decision that the best thing to do at that time—since there would be a flag in each

townsite very close to the schools, we wouldn't fly one in front of each of the schools.

When this issue came up and the American students raised their flag on the flag pole, I never issued any order to take it down because it was a most emotional situation; it was a very delicate situation. And, it seemed to me, as I said before, that the best thing to do in this particular situation was to work for time. And, in working for time, I was working first with the student group at the Canal Zone College. They were a little bit more mature than the group at the Balboa High School. And I thought—I was working there with the teacher of Government at that College—that, if we could get the boys and girls at the College to agree to ask to put up both flags at the College, we would then have a step forward getting the other students also to ask to put up both flags.

If we could have gotten the students then—the great mass of students, instead of these 150 that Mr. Speir said were behind the putting up of the one flag—if we could get the great mass of people—mass of the students to agree to put up the two flags, then we would have something which would contribute a lot of good will rather than destroying of good will.

We were working through a group at the College. We were also working with the parents' groups. We had talked to selected parents, trying to get word out through them to the children. And we were working through an organization we have called the Civil Councils in the Canal Zone, trying to get them to come along with this thing and turn this situation into something good. Personally, when I went to Washington on Thursday, I was most optimistic that we would have reached a solution. I thought the thing was just about set, and I was optimistic, most optimistic that we were going to get out of this thing and it would be perfectly OK.

OAS Ambassador: Mr. Governor, let me ask you a question. As I understand your words, you stated first that there was no order from you that the flag should be lowered.

Governor Fleming: That's right.

OAS Ambassador: Is it not true that you had come to an agreement—I don't know whether among yourselves or with the Panamanians—on a certain date that it was better not to fly any flag in front of the schools because there were other flags flying nearby on buildings, and it was not necessary, and you hoped to gain time to convince the students and other groups to fly the two flags. Therefore, this is the question I want to ask you—when was that decision or agreement among yourselves or with the Panamanians, that no flags should be flown in front of the schools—what was the date?

Governor Fleming: Oh, that was very early.

Lieutenant Governor Parker: July 20, 1962—that was the date of the agreement.

Governor Fleming: We are talking, Mr. Ambassador, about two different time frames almost a year and a half apart—almost a year apart anyway. When I said the decision was made not to fly the flags at the schools because there were flags in the townsites—the two flags in the townsites—I am talking about something that happened about in July of 1962, because that is when we decided with the Panamanian representatives—sometime between July and—I don't know, I don't remember the dates—it was at least a year ago—where these flags would be flown—the 15 locations I was talking about.

Now, when I said I did not give any order to pull the flag down at the school, I meant that I did not order the flag down after the students put it up on the 7th of January because at that time it seemed to me, if I had ordered those American students to pull their flag down, I would have made a delicate situation most difficult.

OAS Ambassador: Why did the students find it necessary to raise your flag?

Governor Fleming: They were very patriotic and quite emotional about this issue.

OAS Ambassador: Did they find it necessary to raise the flag because they knew it was not going to be raised as usual?

Mr. Martin: I think you have to get the intermediate step here; Governor, of when the flag stopped being flown under your decision of July 1962.

Governor Fleming: Under the decision, as I said, which was reached about a year ago, this flag question, because there were other actions which took place which we couldn't immediately complete in the Zone—we couldn't immediately complete in the Zone—we couldn't immediately complete the agreement which we had reached with our Panamanian colleagues and which had been announced in a joint communique issued by the two governments—I think the date of that joint communique was in January 1963. We were not able to complete that business because of some other actions which were taking place, and Dr. Solis and Dr. Fabrega both knew why we weren't proceeding. However, those other things were all disposed of about 3 months ago and we decided then that we would complete the action on the flags. We would go ahead and put up the other flag poles in the other locations and we would take down the flags in the places where we then had American flags flying and where we would not have them flying after the agreement was completed.

So, sometime in the month of December 1963, I decided the date on which I would then complete this action about the flags. And, involved in that was taking down the flags at the schools where they had previously been flown. And, we then put out a press release dated December 30th, announcing the action which we were going to take to com-

plete the flag agreement with the Republic of Panama, which included taking them down at the schools and announcing where we were going to put them up, and the time schedule on which we would start flying the two flags.

OAS Ambassador: Thank you very much because this is exactly what we wanted to know. So, on the basis of that press release, no flag was supposed to fly in front of the school. So, when the students later decided to raise the flag, you stated that you intended to reason with them about cooperation, but subsequently you had all this trouble and difficulty.

Governor Fleming: I knew very well that, if I ordered that that flag, which the students had raised—if I ordered that that flag be taken down, I would only be able to do it by force. And, I knew that this—in this situation, that that would be the wrong thing to do. So. I was trying to use persuasion and not use force.

OAS Ambassador: We understood very well your motive, I'm sure, Governor. May I ask you one decision. I understood Ambassador Martin to say that, on Monday the 6th, in the morning, the students raised the flag, and that that flag was lowered.

Governor Fleming: It was on Tuesday, the 7th. The flag was raised by the students. It was then lowered, ordered down, and it was taken down on the authority of the man who is what we call the Civil Affairs Director—he works for me. The students put it up again the same day—10 minutes or 15 minutes later the students put it up again. He then telephone me and asked me what to do, and I said, "Leave it up."

OAS Ambassador: Mr. Governor, from the 7th to the 9th, the flag pole was surrounded by a group of students.

Governor Fleming: That's right.

OAS Ambassador: And you were trying to use persuasion at that time in order to convince them to reason and

to come to an agreement and to get them to ask you to fly the two flags. And, in the middle of this kind of persuasion campaign, this incident took place.

Governor Fleming: Yes.

OAS Ambassador: Thank you very much.

OAS Ambassador: In our conversation with the Panamanians, we have received some information about the actions of a policeman in a certain place who raised the American flag unauthorized—I think it was not in Balboa.

Governor Fleming: No, it was in Gamboa. Gamboa is the town in the middle of the Canal, halfway between the Pacific and the Atlantic side. In the discussions which we had with Dr. Solis and Dr. Fabrega we discussed the question of the flags which were flown by private individuals, not officially by the Government. There are in the Zone some American Legion clubs, veterans' clubs, and things like that. And, this flag at Gamboa is a war memorial to the people from Gamboa and from the Canal Zone who were killed in World War II. In the discussions with the Panamanians, I specifically mentioned that flag as being one that we would not change because, obviously, if it was a war memorial, there is a lot of sentiment about that; and that flag would continue to fly without a Panamanian flag with it because it is a memorial. We were going to have another place in Gamboa where the two flags would be flown. In the agreement that we made with the Panamanians, it said that, where the flag was flown officially by the civilian authorities in the Canal Zone on land, then both flags would be flown. This flag actually, in Gamboa, is flown by a private association; it is a memorial association of that town. As I said, in the discussions with the Panamanians, I covered this flag specifically, and it is mentioned in the minutes that we mentioned this particular flag. The policeman—very frank—the policeman in this article which appeared in the newspaper a couple days before—that

policeman it seemed to me may have been seeking publicity. I told the policeman rather emphatically, as emphatically as I could, that I considered his action in going to the newspapers and telling them all about it, completely out of order. We had already arranged—at the time the policeman got the publicity in the newspaper, I had already arranged with the civic people out in Gamboa that they, as private citizens, would put that flag up and down, so it would not be anything officially connected with the Canal Zone, and that would then carry out the discussions about the particular flag which we had in the meetings with Dr. Solis and Dr. Fabrega. I don't know whether they right now remember it specifically. But, after that publicity we had in the paper, I went back and checked on my records of our meetings, and that flag is covered as an exception in those records. That was about last July—July 1962.

OAS Ambassador: Thank you very much. I think it was very clear then that the Panamanians have agreed to that flag particularly. It was a private flag and there was no question about it.

Governor Fleming: To the best of my recollection, I think that at the time Dr. Solis and Dr. Fabrega both knew that that particular flag I was making an exception of, because it is a war memorial.

OAS Ambasssador. Thank you very much.

(The meeting adjourned at 1830 hours.)

SECOND SESSION

El Panama Hilton Hotel, Panama City, Republic of Panama
9:30 a.m., February 15, 1964

Proceedings

Mr. Martin: Mr. Chairman, with your permission, we will continue as we did yesterday with a presentation of a film and slides. We will start out now with General Mabry who was in charge on the Pacific side and whom you met on your trip day before yesterday, and follow up with Colonel Sachse who was in charge on the Atlantic side. Following their presentations we will welcome any questions you have about the operations of the military and we have a witness General Andrew P. O'Meara, the U.S. Commander in Chief of Southern Command, who will be ready to answer questions about activities in either of these two points or anywhere else in the Canal Zone that you may have an interest in. Then I will conclude with a very brief summary.

General Mabry: Gentlemen, I intend to give you a description of the events that took place along the Republic of Panama-Canal Zone boundary on the Pacific side of the Isthmus, that is, Panama City, Balboa, beginning at 7:45 p.m. on Thursday, 9 January 1964, and continuing through 8:00 a.m. on Thursday, 16 January. Following my presentation, Lieutenant Colonel Sachse will describe the action which took place on the Atlantic side of the Isthmus, that is, the Colon and Cristobal area during the same period. In my presentation I shall mention all orders issued by General O'Meara, Commander in Chief, United States Southern Command, which affected military operation on both the Atlantic and the Pacific sides of the Isthmus.

In way of a brief orientation, the border between Panama City and the Canal Zone, Balboa area, is indicated on this map by the heavy green line. Kennedy Avenue, 4th of

July Avenue down to this point. The boundary runs along the curb of the street on the Republic of Panama side of Kennedy Avenue and 4th of July Avenue. Some buildings and areas of which I will mention during the presentation which are within the Canal Zone are the Ancon Foundry, the Freight Terminal and the building adjacent thereto, the Tivoli Guest House, the junction of Gorgas Road and Kennedy Avenue, the limits, which is the junction of Balboa Road and 4th of July Avenue and within the Republic of Panama, the Legislative Palace and Pan American building.

Gentlemen, at 7:45 p.m. on Thursday, 9 January, General O'Meara issued an order to the military forces to be alert for possible movement. This order was based on a conversation General O'Meara had with the Acting Governor of the Canal Zone. The Acting Governor indicated that in view of the demonstrations held at the Balboa High School within the Canal Zone it appeared he may have some difficulty and may be forced to call upon the military for assistance. At 7:59 p.m. General O'Meara assumed control of the Canal Zone and directed U.S. military troops to secure the Canal Zone boundary on the Pacific side and clear rioters from the Canal Zone. This was based upon a late conversation with the Acting Governor of the Canal Zone to the effect that the situation was beyond his control and he requested General O'Meara to assume control of the Canal Zone.

General O'Meara authorized the use of tear gas as maximum force to be used against the rioters.

At 8:00 p.m. General O'Meara directed me to go to the Tivoli Guest House area and evaluate the situation along the border. I arrived at the junction of Gorgas Road-4th of July Avenue stopping short about 300 yards. In that area I observed about 500 rioters who had penetrated the Zone some 100 yards. Five Canal Zone policemen were attempting to hold the rioters back by using tear gas grenades.

I then proceeded to the Tivoli Guest House area. In front of the Tivoli Guest House and on Kennedy Avenue and in the Shaler Triangle there was a crowd that I estimated to be around 1,000. Many of them were in Kennedy Avenue and were throwing rocks and Molotov cocktails over the fence toward the Tivoli Guest House. Three Canal Zone policemen were using tear gas grenades in an attempt to restrain the mob from climbing the fence and setting the Tivoli Guest House on fire.

At 8:35 p.m. a company of troops numbering about 100 transported in two-and-a-half ton trucks arrived at the Tivoli Guest House. The column stopped about here (pointing to the map). The troops dismounted and deployed, took up positions along the fence in front of the Tivoli Guest House. The rioters continued to throw stones and Molotov cocktails over the fence at the troops and toward the Tivoli Guest House. They were dispersed and driven back across 4th of July Avenue by troops using tear gas grenades. I then proceeded to the Ancon Laundry—here it is (pointing to map). Approximately six Canal Zone policemen were behind a temporary barricade which had been erected as a protective barrier in Roosevelt Street adjacent to the Ancon Laundry. Opposite this position and on Street 24 in this area (pointing to map) there was a crowd which I estimate to be around 1,000 to 1,500. Some were down the side streets. Along this area, which is a fence enclosing the freight terminal and freight yard, there were approximately 500 rioters up against this fence. They were throwing Molotov cocktails and rocks over the fence in an attempt to hit the Canal Zone policemen who were in this loading shed. Molotov cocktails were being thrown in this direction (pointing to freight terminal and loading shed on map). Canal Zone firemen were extinguishing fires as they were set. The fire truck was about here at this corner of the building. The mob in this area would surge forward and on occasion Canal Zone policemen behind this

temporary protective barrier would discharge their pistols over the heads of the crowd and on occasion fire into the ground in order to hold the crowd back.

I secured 15 U.S. soldiers, eventually, from the 110 which had arrived at the Tivoli Guest House and began to progressively relieve the Canal Zone policemen, who were behind this protective barrier and those who were protecting the freight terminal. All told in this area there were about ten Canal Zone policemen.

At 9:20 p.m., while I was still in this general area, General O'Meara reported by radio that he had received a report that approximately 1,000 rioters had entered the Canal Zone boundary at the junction of Balboa Road and 4th of July Avenue, in this area (pointing to map). He requested that I secure some troops and proceed to that area in order to remove the rioters from the Zone. About this time three armored Personnel Carriers, containing six soldiers each, arrived in the Ancon Laundry area. I immediately got the Lieutenant in charge and directed that he follow my vehicle to this area (pointing to map). However, at about this same time a Canal Zone policeman reported that Judge Crowe's house was under attack. Judge Crowe's house is right here (point to the map). So I decided to go by Judge Crowe's house first on the way to the junction of Balboa Road and 4th of July Avenue. As I reached Judge Crowe's house I parked the three personnel carriers, with the six soldiers in each making a total of about 18, in the rear of the house and went around to the front yard. I contacted a policeman in the yard, telling him that I had 18 soldiers in armored Personnel Carriers in the rear of Judge Crowe's house and that if additional assistance was required to protect the Judge's house the Lieutenant would employ troops in riot formation and use tear gas to assist. The policeman stated that about 15 to 20 rioters had come across 4th of July Avenue and had thrown Molotov cocktails over the fence. I saw some of

these Molotov cocktails still burning. Then I went down to the junction of Balboa Road and stopped short of the junction it makes with 4th of July Avenue. I stopped about 500 yards short of the junction. When I walked down Balboa Road toward 4th of July Avenue I then met Captain Wall who is a police captain of the Canal Zone police. He had with him about 18 policemen. They were attempting to hold back a crowd I estimated to be around 1,000. Earlier the mob had penetrated the Zone approximately 400 yards. This was confirmed, by a senior military officer who earlier had observed this from a position on Ancon Hill, about here (point to the map). It was evident to me from the rocks and so forth in the street in this location that the rioters had at one time penetrated up to 400 yards. When I arrived, however, they were approximately 150 to 200 yards in the Zone. I conferred with Captain Wall. During the conversation three rioters broke a commercial gas line about 100 yards, 150 yards up Balboa Road, and set fire to the leaking gas. This caused me some concern because I was afraid that the tank containing the gas would explode. The Fire Chief of the Canal Zone Police Department was with Captain Wall so I asked the Fire Chief to turn off this gas as quickly as possible.

At 10:15 p.m. approximately 50 U.S. soldiers in 2½-ton trucks arrived on the scene. They stopped short about where I had stopped and dismounted, and I directed the first platoon, consisting of about 30 soldiers, to assume a riot control formation, move down Balboa Road and remove the rioters from the Zone. These soldiers moved down the road followed later by the second platoon of about 40 U.S. soldiers. When they had pushed the rioters across 4th of July Avenue, and no soldier went further than the middle of the street of 4th of July Avenue, the soldiers crouched down. At this time they were subjected to a deluge of rocks, bottles and Molotov cocktails. One soldier received a wound in the eye from a rock which caused severe lacera-

tions on the side of the nose, the cheekbone, and the eyebrow. Another soldier received a cut over the lip which I later determined needed four stitches to close it. Only tear gas, no firing was used to disperse the rioters.

These rioters in this area were removed from the Zone at approximately 10:25 p.m. I then returned to the military headquarters, Quarry Heights and reported to General O'Meara. At this time I learned that troops in the vicinity of the Tivoli Guest House had begun receiving sniper fire from individuals positioned in the vicinity of the Legislative Palace and the Pan American building. Colonel Trahan, Chief of Staff of the U.S. Army Forces, Southern Command, requested permission to return fire. General O'Meara directed Colonel Trahan to phone the Guardia Nacional and ask that they do something about stopping the sniper fire. General O'Meara denied permission to return fire of the snipers. The request was delivered to the Guardia Nacional by a U.S. Army liaison officer in addition to the telephone call made by Colonel Trahan.

At 10:45 p.m. I returned to the Tivoli Guest House in view of the sniper fire in that area. When I arrived about 25 rioters were along the 4th of July Avenue in front of the Tivoli Guest House. An additional 25 to 30 rioters had commenced breaking store windows in shops along 4th of July Avenue in the Republic of Panama. They were using two-by-four timbers to break windows and appeared to be looting and destroying the contents of the stores along 4th of July Avenue. While crouched on the ground in the vicinity of Tivoli Guest House, at about this position (pointing to map), I came under sniper fire from a position I guessed to be in the vicinity of the Legislative Palace. Later I actually saw a sniper who was behind a wall adjacent to the Legislative Palace. He would raise up, fire, and duck back down behind the wall. While I crouched on the ground in this location a Sergeant was hit in the left

shoulder by a sniper bullet. He was about six yards from where I was.

At 10:50 p.m. troops continued to receive sniper fire in the vicinity of the Tivoli Guest House. Based on another request from Colonel Trahan, General O'Meara authorized directed and controlled shotgun fire against identified snipers in this locale. Shot was limited to number four and seven-and-a-half bird shot. Again I want to emphasize it was closely supervised. An individual would be designated to use the shotgun in an attempt to deter the sniper fire. I observed this fire while in the area and I also assured myself that it was not promiscuous firing. I also determined rather quickly that the shotgun fire would be ineffective due to the distance involved, or distance between the position of the firer and the position of the sniper in the vicinity of the Legislative Palace. At no time was shotgun fire used near any group of individuals. I had hoped that this shotgun fire would deter the sniper activity.

At 10:55 p.m. the sniper fire from the Republic of Panama into the Canal Zone had wounded one American civilian and two soldiers.

At 11:05 p.m. General O'Meara approved a concept of operation for the following morning which was if the situation were stabilized troops along the border would be withdrawn to reserve positions. Wire barriers would be removed and only two Military Policemen would man the check points at the points of entry into the Canal Zone from the Republic of Panama. This was to be accomplished prior to 5:00 a.m.

At 11:15 p.m. General O'Meara phoned Foreign Minister Solis and informed him that U.S. troops were being wounded by sniper fire coming from the Republic of Panama and that under the circumstances we had to return the sniper fire but if the Guardia Nacional could stop the sniper fire he would cause his troops to stop the shotgun fire.

Minister Solis said that he would see that the Guardia Nacional were given immediate orders to seize all snipers and to stop all sniper firing. Based on this commitment, General O'Meara directed the shotgun firing by U.S. soldiers to cease. His order was complied with immediately.

At 11:30 p.m. we received a report that in David, Republic of Panama, rioting had started about 9:00 p.m. Americans living in that area were forced to flee the country and enter Costa Rica. Anti-American demonstrations also took place at Rio Hato and Chitre.

At 12:20 a.m. on Friday, 10 January 1964, two soldiers in the vicinity of the Tivoli Guest House were wounded by sniper fire coming from the Republic of Panama. This made a total of four wounded, one by sniper fire coming from the Legislative Palace and the Pan American building and that general vicinity. Accordingly, Colonel Trahan requested General O'Meara to authorize the use of .30 caliber ball ammunition against snipers. General O'Meara authorized the use of ball ammunition by trained marksmen for carefully selected and directed controlled counter-sniper fire. At the Tivoli Guest House I assured myself that only a well trained marksman was selected to accomplish this task.

At 12:30 a.m. troops at the Tivoli Guest House continued to receive sniper fire, and began receiving automatic weapons firing coming from the Legislative Palace. A fifth soldier was seriously wounded in the head and a sixth soldier was also seriously wounded in the body. The tactics used by personnel manning the automatic weapons in the Legislative Palace were briefly as follows: One individual was on top of the Legislative Palace and he appeared to have a weapon similar to the old German submachine gun. It had a very high cyclic rate. He would come up over a wall, strafe the area, then duck down behind the wall. A minute or two later another individual with a different

type automatic weapon, which I estimated to be about .45 caliber, similar to a submachine gun, would open a window on about the third or second floor from the top of the building, spray the area and duck back in. Later he would appear on another floor and do the same thing. Intermittently between these bursts of automatic weapons fire individual snipers, one firing what appeared to me to be a .22 caliber, was on top of the Legislative Palace. Another weapon appeared to be around .30 caliber, high-power hunting rifle, was being used from the top of the Legislative Palace. Down on the ground there appeared to be three or four individuals shooting pistols on occasion. They would fire a couple rounds and disappear.

General O'Meara telephoned Lieutenant Boyd of the Guardia Nacional at 1:10 a.m. General O'Meara informed Lieutenant Boyd that he would have me call at 5:00 a.m. and give him, Boyd, a decision as to whether the Canal Zone border would be opened to peaceful traffic commencing at about 5:00 or 6:00 a.m. the morning of the 10th.

At 5:48 a.m. I received a request from Commander, U.S. Army Forces Southern Command, to permit a check point to be placed on the Colon Corridor on the Atlantic side. The rioters were moving toward a civilian housing area known as Rainbow City and were threatening the safety of the civilians in that area. In view of the situation, I authorized a check point to be established on the Colon Corridor. Colonel Sachse in the presentation to follow mine will cover this in more detail.

At 5:00 a.m. the morning of the 10th I called Lieutenant Boyd at Guardia Nacional Headquarters and asked if Colonel Vallarino, Commander of Guardia Nacional, believed the situation in Panama City was sufficiently under control to permit traffic to enter the Canal Zone. Lieutenant Boyd stated that the Guardia Nacional believed that by 6:00 a.m. they would have the situation well enough in hand

so that they could control the situation in Panama City. I informed Lieutenant Boyd that the Canal Zone border would be open to peaceful traffic, both on foot and in vehicles. I requested active support from the Guardia Nacional and received assurance that such cooperation would be extended. I then informed the U.S. Army Commander to permit peaceful individuals and vehicular traffic to enter the Zone effective at 6:00 a.m. At 6:00 a.m. all entry points into the Canal Zone on the Pacific side were opened to peaceful traffic. Only two Military Police were at each check point and a brief examination only was given to individuals desiring to enter the Zone.

At 6:10 a.m. crowds began to form in the Shaler Triangle and along Kennedy Avenue in the vicinity of the Pan American building, the burned out Pan American building. Initially the crowd numbered about 500 and then began to increase.

At 8:00 a.m. demonstrators climbed through the fence in the vicinity of the Tivoli Guest House and came in the Zone for a distance of about 30 or 40 yards. About 30 U.S. troops using riot control formation and employing tear gas dispersed them.

At 11:45 a.m. President Chiari requested U.S. troops cease counter-sniper fire to permit the Guardia Nacional to take action against the snipers. General O'Meara ordered the counter-sniper fire from the Tivoli Guest House to stop. This order was complied with immediately. So all sniper fire ceased. The counter-sniper fire was delivered by trained marksmen stationed in the Tivoli Guest House.

General O'Meara: You said the sniper fire ceased. You mean it was the counter-sniper fire that was ceased?

General Mabry: Yes, sir. I want to be clear on this. We stopped the counter-sniper fire which was being delivered from the Tivoli Guest House. The sniper fire continued from the Republic of Panama.

At 12:20 p.m. about 800 Panamanians gathered at the Shaler Triangle and cries for a march on the Zone were heard but no march was attempted. During the morning of Saturday, 11 January about 300 Panamanians threw stones at houses along Gaviland Road which is in this area. The housing area is here (pointing to map). U.S. troops, about 20 in number, dispersed these Panamanians and removed them from the Zone by using tear gas grenades. During the afternoon of 11 January on three separate occasions, groups of Panamanians varying in number from 300 to 350 entered the Canal Zone in the vicinity of the Guest House, Tivoli Guest House. Approximately 40 U.S. troops on these three different occasions used riot control formations and tear gas to chase the Panamanians from the Zone. These three penetrations at different times in the afternoon occurred in this area (pointing to map). Also approximately 200 Panamanians entered the Canal Zone at the junction of Gorgas Road and 4th of July Avenue. They penetrated about 30 yards and 33 U.S. soldiers were employed in riot control formation and used tear gas to drive them from the Zone. Starting at 8:00 p.m. and continuing through the night of 11 January automatic weapons fire and rifle fire was directed at the Tivoli Guest House and nearby buildings in the Canal Zone. The fire came from the Legislative Palace area and the Pan American building area within the Republic of Panama. Approximately 400 rounds were fired into the Zone during this period.

General O'Meara: George, one thing you didn't say, after the President's request the fire did not immediately stop. Sometime afterwards it was stopped by Guardia Nacional who had gone in there.

General Mabry: About this time the sniper fire did die down and cease for about two or three hours. However, it commenced again at about 8:00 p.m. and continued to about 2:00 a.m. in the morning. They continued to fire

and this is when I mentioned about 400 rounds came into the Zone in this general area.

During the daylight hours of Sunday, 12 January, everything was relatively quiet. However, at 8:00 p.m. automatic weapons and rifle fire was again delivered into the Canal Zone from the Legislative Palace and other buildings in that general vicinity. From 8:00 p.m. on the 12th of January until 4:00 p.m. on the 13th, approximately 800 rounds were fired into the Zone from the Republic of Panama. During Monday the 13th, Tuesday the 14th and Wednesday the 15th of January everything was relatively quiet. Panamanian workers entered the Zone and busses operated normally.

At 8:00 a.m. on Thursday, 16 January, General O'Meara relinquished control of the Canal Zone to the Governor.

Casualties suffered were as follows: The U.S. military personnel killed by rifle fire or pistol fire, 3. Wounded by fire or pistol fire, 24. Lacerations and abrasions suffered from rocks, glass bottles and clubs, 158. U.S. civilians wounded by rifle or pistol fire, 3. Lacerations, abrasions, fractures, 20. Non-U.S. citizens wounded by rifle or pistol fire, 2. Abrasions, lacerations, fractures, 3. Total casualties all categories, 213.

We have a short film clip with some scenes which I believe you might be interested in. It's about eight minutes long.

Molotov cocktails were thrown at night as well as in the daytime. A shot of the Pan American building. Some damaged cars within the Canal Zone. A view of the Pan American building the following morning. Mobs or parades formed throughout the day. This is a group in the vicinity of the Pan American building. Defacing of the monument in Shaler Triangle. The American flag pole supporting the American flag was torn down and replaced by this Pana-

manian flag. Cars being turned over using this technique. That car was in the Canal Zone. This American flag is being torn and bits of it are being thrown into the fire. The Panamanian flag was affixed to the top of this light pole in the Canal Zone.

Ambassador Martin: What day is this?

General Mabry: This is the 10th of January, the first day following. This mob entered the Zone, was rejected by U.S. troops using tear gas grenades.

General O'Meara: They were simply moved as far as 4th of July Avenue. Fourth of July Avenue, it's part of the Zone but we did not attempt to move them once they reached 4th of July Avenue.

General Mabry: I call your attention to the distance the troops are from 4th of July Avenue. They are not in close contact with the crowd. Troops are beginning to erect a wire barrier across this entrance which is well within the Zone. Many rocks were thrown and proved to be an effective weapon. Some shots of the snipers firing. The Tivoli Guest House where most of this firing was directed. Preparations inside the Tivoli Guest House were protection against sniper fire. Selected U.S. soldier returning counter-sniper fire. This is an officer attempting to knock out the bannisters so that he could get a better view, try to determine the exact location of the sniper fire. This officer was hit by sniper fire while he was attempting to knock out the bannister. He was dragged to a safer place and given First Aid.

Ambassador Martin: A shoulder wound?

General Mabry: Yes, sir. That concludes my portion.

Ambassador Martin: Colonel Sachse?

Colonel Sachse: Committee members, gentlemen, I was the local ground Commander in the Cristobal, Canal Zone

area. I would like to brief you on what took place in this section.

At 8:50 p.m. on Thursday, the 9th of January, my unit, consisting of approximately 700 troops, was alerted. At 9:25 p.m. my battalion consisting of approximately 700 troops was ready for movement. At this time I issued my unit, consisting of 700 troops, riot control devices. I issued ammunition to one of my units, consisting of 135 troops. The ammunition consisted of 16 rounds of M-1 ammunition, one clip of .45 ammunition, 50 rounds of carbine ammunition to the platoon leader only and 5 rounds of shotgun ammunition per individual armed with a shotgun. This was in a unit I intended to move first.

I issued only riot control agents to the other two units in my battalion. They had no ammunition whatsoever at this time, not even shotgun ammunition. I would like to point out that machine guns were never taken to Cristobal, Canal Zone. They remained on the post at Fort Davis.

At 9:50 p.m., 9 January, I received a message from higher headquarters to move my unit consisting of 700 troops from Fort Davis, located in this area, to Cristobal, Canal Zone, Pier 9, which is located on the larger map—this sector right here (pointing to map). I led my battalion to Cristobal, Canal Zone, arriving there approximately 10:15 p.m. The message I received was to clear the rioters from the Canal Zone, seal the border between the Canal Zone and the Republic of Panama.

Arriving at Pier 9, Cristobal, Canal Zone, I immediately helped my unit in place at Pier 9 and made a quick reconnaissance. I moved to the front of my jeep in the vicinity of the Commissary building, made a swing around through the street by the Masonic building, looked at the YMCA to see what was in this sector. At that time I saw an estimated, probably about 400 rioters in this vicinity. They were breaking glass out of the Commissary building,

Canal Zone. They were breaking glass in the lower windows in the Masonic Temple, Canal Zone, and also breaking windows in the YMCA and the doors to the YMCA in the Canal Zone. I noticed the rioters after breaking the windows were going through the windows, some of them returning back through the windows with things in their arms, and it appeared to me that they were looting.

I quickly returned to my unit located at Pier 9 and ordered my lead unit, consisting of 135 troops, to move out and follow me. I took this unit to this control point number one, by the Commissary building at Eleventh and Front Street, and placed them in a riot formation, which is a standard formation for our Army troops—it's standard training—with orders to move down the right side of Eleventh Street, drop off personnel from the rear of the column, seal the streets as they went. A company moved out and at this time I left my Executive Officer, who is my assistant, to stay with "A" Company.

I returned, gave "B" Company, consisting of approximately 140 men, the mission of clearing the area between 12th and 13th Streets and 14th Street in this sector right in here (pointing at map). "B" Company moved out and arrived in formation in the same method. The number of rioters in the "B" Company area was practically none. Most all of the rioters were operating in the three buildings located along the border in the Canal Zone which was the Commissary building, the Masonic Temple and the YMCA where mass destruction was going on. After starting Company "B", consisting of approximately 140 men, on their mission I returned to see what was taking place with the other unit.

This unit had moved down the right side of 11th Street and sealed the entrance by dropping off personnel at Fort Street and 11th Street at this control point (pointing to map). "A" Company turned right on Balboa Avenue in

this area (pointing to map) which is between the Masonic Temple and the Commissary building and the YMCA. At the rear of the YMCA building a group of Panamanians located on Balboa Avenue in the Canal Zone, approximately 23 individuals, were standing with a Panamanian flag. As the troops approached they were ordered to move from the Canal Zone, both the Canal Zone Police Captain and my Executive Officer.

The Panamanians would not leave and as the troops got close to them in their riot formation some of the group decided to try to take the weapons away from the soldiers. They grabbed the bayonets and tried to yank the rifles from the troops. In doing this several of the Panamanians in this group were cut with the bayonets, to what extent I do not know. The unit moved on down the street, making contact with "B" Company, approximately 140 personnel in this area, and then moved back towards the Masonic building back up the street.

As they passed by the Masonic building to go around to the front of it on the corner of 11th and Bolivar Street about 15 Panamanians jumped out of the second story windows of the Masonic building onto the formation of troops, right in the middle of them. Some of these people had lead pipes. They had sticks, they had rocks, and they jumped into the middle of the troops. They started to grab rifles and swinging lead pipes. A scuffle started in this vicinity and again some of the Panamanians were cut but to what extent we do not know. The Panamanians left the area at this point.

At this time we had the Zone around the buildings, and we had the intersections also cleared off, sealed off. As this was taking place the troops were moving down the right side of 11th Street. As they were moving down this street, the Panamanians were throwing rocks, sticks, bottles, anything that they had they were throwing at the troops. As

the troops stood on the border around the Canal Zone, Panamanians stepped up their attacks of sticks, rocks, and we had a number of people injured.

Then sniper fire started. We had one man wounded in this unit. This was around the Masonic building. We realized then, when this man was wounded, that the sniper fire had started. We started moving troops for cover off the border. We moved some back to the rear of the Commissary building. We moved some inside of the Commissary building. The same happened for the YMCA and the Masonic building. The sniper fire became rather heavy before midnight and the area to the rear of the Masonic building, Commissary and YMCA became a no-man's land of sniper fire. In fact, it was so thick that it was dangerous to even try to work your way to the Masonic building to check on the troops.

On the morning of the 10th my first man was killed by sniper fire. This was at about 2:30 a.m. At 5:30 that morning I had had 3 soldiers killed and I had had 9 individuals wounded and we had still not fired a shot at the rioters that were shooting at us from the Republic of Panama.

During this period of time, the early morning hours of the 10th, I dispatched a force consisting of about 35 individuals to the France Field-Coco Solo area with the mission of protecting property and lives. This force patrolled by jeep from France Field located in this area (pointing to map) down to the Trans-Isthmus Highway and out to the Coco Solo Hospital. This patrol stayed in effect during the 10th. We had had reports that there was to be trouble in the vicinity of the Coco Solo Hospital and this force was sent to that location to protect life and property there. Also I dispatched a force of about 50 men to Bolivar Avenue to put in a check point to check for rioters coming through with weapons or ammunition. This was called Check Point

1. I had about 50 personnel at this check point. At this check point we had sandbags to protect our troops from sniper fire. Also a strand of barb wire across the road. During the early morning hours of the 10th the sniper fire throughout the area was quite heavy. Molotov cocktails in this area coming from the crowd were quite heavy in the early morning hours of the 10th. It was estimated that on Boliver Street, in this section facing the Masonic building and on 11th Street facing the Masonic building, there were approximately 2-3,000 Panamanians in the area who were being pushed by unknown personnel using loudspeakers. The best we could tell, the people on the loudspeaker trucks were trying to build them up and agitate the crowd to the point that they would come back into the Canal Zone. They did come down close to the Masonic building in the early morning hours of the 10th. We used riot control agents to keep the crowd back.

General O'Meara: Instead of saying riot control agents, what you were using specifically was tear gas?

Colonel Sachse: This is correct, sir, tear gas. I might bring out at this point—the early morning hours of the 10th tear gas was the only weapon our troops had used to keep the crowd back across the border once we had cleared the area.

During the late morning hours of 10 January we were still receiving heavy sniper fire. The YMCA building was on fire from Molotov cocktails being thrown from the Republic of Panama side into the front of it. We were unable to protect it due to the fact that it is set on the border between the Canal Zone and the Republic of Panama. Therefore we practically lost most of this building by Molotov cocktails. There were two cars burned around 11:05 a.m. the morning of the 10th in the vicinity of the Masonic building on the Bolivar and 11th Street intersection. Crowds of 100 to 200 were operating in the vicinity of

Front Street and trying to burn what was known as the old fire station building right across from the Commissary building in the Canal Zone, using Molotov cocktails.

I had one small unit in the building consisting of about 20 men to protect it. In the afternoon hours on 10 January we still received heavy sniper fire. Crowds of from 300 to 600 were operating up and down the streets approaching the YMCA and the Masonic building, with a small group operating in the Fire Station building.

On 11 January, Saturday, I received a call that there was trouble to be expected at Coco Solo Hospital. I personally got in a chopper and visited Coco Solo Hospital and added strength to the protection of this facility. At this time I placed 20 personnel in the vicinity of Coco Solo Hospital to protect property and life. From 12:01 a.m. on 11 January to 1:00 p.m. our front in this sector was relatively quiet except for Molotov cocktails being thrown at the Masonic building.

From 1:00 p.m. to 6:00 p.m. on 11 January the sniper fire stepped up again in the sectors from the Commissary to the Masonic Temple and YMCA. It was quite heavy. The Commissary building was set on fire during this period of time, when the sniper fire stepped up. There had been so many Molotov cocktails thrown through the windows of the Commissary building that the floor was just covered with oil and gasoline or kerosene, whichever they were using. And they got in a lit Molotov cocktail on this and it just went up all at once. The firemen who were there with us were unable to control the fire in this building so the Commissary burned in the afternoon of 11 January which was Saturday. Crowds of from 300 to 1,500 were operating in the area around our front on 11th Street, Bolivar Avenue and a few on Front Street. Again they were approaching the border, throwing sticks, rocks, Molotov cocktails at the troops positions trying to set buildings on fire.

From 6:00 p.m. to 12:00 p.m. on 11 January crowds up to 1,500 operated to the front of the Masonic building on 11th Street and Bolivar Avenue approaching this intersection (pointing to map). As the crowds moved to the border again we used tear gas to disperse them and push them back. The sniper fire had become so heavy at this time, and because of the wounded personnel that I had had, I requested of higher headquarters to let me fire at the snipers with shotguns fired by selected personnel.

On 11 January at 2:45 p.m. the request was approved and I did start to fire shotguns at this time at the snipers. It seemed to slow up the sniper fire at this particular time but it did not stop it completely.

General O'Meara: I want to make the point that this was the first time your men had ever used their weapons, is this correct?

Colonel Sachse: That is correct, sir.

General O'Meara: No weapons had been fired by any of your troops until 2:45 p.m. Saturday, the 11th?

Colonel Sachse: That is correct, sir. This was the first time that ammunition had been fired at any Panamanians in my area of operations which was Cristobal, Canal Zone.

On the morning of 12 January, which was Sunday, at 1:30 a.m. we were still receiving heavy sniper fire and Molotov cocktails again on the Masonic building coming from the bars located across the street, that is, about 50 feet or 75 feet away from the Masonic building.

From 2:00 a.m. until 11:00 a.m. we did not receive very much sniper fire on 12 January. From 11:00 a.m. until 10:00 p.m. 12 January, again we received heavy sniper fire. Molotov cocktails were quite heavy at the Masonic building. The second floor of the Masonic building was set on fire at this time. The soldiers inside of the Masonic building and some firemen put the fire out. Two men during this

period were wounded in the Masonic building by sniper fire. One was wounded in the arm; one was wounded in the shoulder. We had a very hard time getting these two wounded people out of the building. We had to build up a truck with sandbags for protection to get to this building which is up at the corner of our sector because of the cross sniper fire coming into this area—very dangerous. We did build up a truck with sandbags and moved it in and got the two wounded men out of the Masonic building.

At 4:20 a.m. on Monday, January 13, the Guardia Nacional moved into this area in the early morning hours by truck and started to search all buildings from the top to the bottom all the way around our front. Some were armed with rifles; some were armed with pistols and were well fixed for the job. After they had shaken these buildings down we had no more trouble from sniper fire in the Cristobal area.

General O'Meara: We had no more trouble after the Guardia Nacional shook those buildings down?

Colonel Sachse: That is correct, sir. After the Guardia Nacional moved into this area around 4:20 a.m. in the morning they shook down the buildings to our front in the Republic of Panama sector from top to bottom. I personally watched them go into the buildings, go to the top and shake them down good. After that there was not another sniper shot fired at our troops located across the street in Cristobal, Canal Zone.

Now at this time I would like to back up to one point I saved until the end. This concerns two other check points, which were known as the Colon Corridor check points. These were authorized by higher headquarters. Check Point Number 2, as we called it, we put in at this location (pointing to map) right across from Check Point number 1, and Check Point Number 3, which was located—I can show you on this map—at the other end of the corridor at the

intersection of Randolph and the Trans-Isthmus Highway. This black line as you see on the map is the road coming through the Canal Zone and rejoining the highway. We requested permission from higher headquarters on the morning of 10 January at 5:30 a.m. to place a check point at each end of this area in order to insure the protection of the people of Rainbow City. Also to check for weapons and ammunition that might come back in this area and get into our rear (pointing to map). Before I made this request I personally checked with the Panamanian officials in Colon and requested that they place a check point on the Colon Corridor to check these people in order to work with us on Check Point 1. This request was denied, for what reason I do not know. I was just told that they could not place a check point at that location.

That is when I requested from higher headquarters to place a check point at this location. This was to be known as Check Point number 2. Another check point was placed at the other end of the Colon Corridor at the intersection of Randolph Road and the Trans-Isthmus Highway. This was to be known as Check Point number 3.

Now in between these two check points the Panamanian Government had the road closed before I put in the check points. They had closed it in early December to effect repairs. They had placed four 55-gallon oil drums across each end of this road. They had 2" by 10" planks on top of the barrels and this was to keep vehicular traffic from going through here.

I was approached by the then Minister of Public Works, Mr. Bazan, Check Point Number 1, and asked if vehicles or traffic could continue going through the Canal Zone using this road (pointing to map) to rejoin the Trans-Isthmus Highway at this location, Check Point Number 3. I told him that we were not turning any vehicles back at the check points, that we were strictly looking for weapons and ammunition and then letting them go through. I told

him I was more than happy to keep his traffic coming through the Canal Zone here to here and then rejoining the Trans-Isthmus Highway. He was very happy about it and then he left.

General O'Meara: Did he tell you what the purpose of those barricades were, when they had them put up?

Colonel Sachse: The barricades were put up on both ends, were put up around 4 December, three to four weeks before the riots started, and that was for the purpose of repairing the Colon Corridor in this sector only. That was the only purpose they were there for, but the traffic was blocked. Our Check Point number 2 and Check Point number 3 were checking only foot traffic. The barrels remaining there during our operation but we had check points at these two locations. The Panamanian Government never removed the barrels. Their vehicles continued to come through the Canal Zone check point. We had one other place that I would not classify as a check point and that was in the vicinity of the Coco Solo Hospital. We had gotten word that a mob of 200, approximately 200 Panamanians, was approaching the Coco Solo Hospital and it was heavily loaded with the idea of violence. I immediately got in a chopper from my Command Post at Cristobal and went to just the other side of the Coco Solo Hospital located right about here (point at map) about 200 yards below and at that location I landed and noticed an individual standing on the road. It so happened this individual was a lieutenant of the Guardia Nacional. I approached him and he was worried about the trouble in this area so we jointly put in a temporary check point at this location to turn this mob back or to screen the ones that he felt were safe and let them through. The search that was made of the automobiles in this vicinity was done by the Guardia Nacional lieutenant while I stood by near the hospital with a force of about 35 personnel and watched.

Ambassador Martin: How long?

Colonel Sachse: That check point stayed in for about three hours until we were satisfied that the mob had either turned back or that he had screened a certain number of them, let them go in Colon. The ones that were turned back he personally turned back himself; I backed him up on it. Getlemen, that—

General O'Meara: Before you sandbagged the truck in order to evacuate casualties from the Masonic Temple you made another attempt with a military ambulance I believe, didn't you?

Colonel Sachse: Yes, sir.

General O'Meara: Tell about that.

Colonel Sachse: Before I sandbagged the truck to try to get the wounded out of the Masonic Temple I sent for a one-and-a-quarter ton ambulance which had the ambulance cross painted on it on both sides, the kind that we use within the Army, our small troop ambulance, to go to the Masonic Temple building to pick up these two wounded people. Well, as they approached the Masonic building one of the medics was shot that was in the ambulance, shot in the ambulance.

General O'Meara: It had the red cross painted on it?

Colonel Sachse: That is correct, sir, it did. It had the red cross painted on it. The driver quickly turned the ambulance around and got out of the area and sent this man who was shot in the knee, just below the knee, right in here, back to the aid station and then we proceeded to sandbag the truck and move it into that area.

Also we used quite a number of sandbags in that area. We used sandbags on top of the Masonic Temple, on the top floor which a number of you visited while you were on the Atlantic side. We put them up against the wall for protection from both sniper fire and Molotov cocktails. We used sandbags in the parking lot to the rear of the YMCA

in order to protect the troops who had to be outside. We also used sandbags in this big open area on this side, where I had two men killed before we put in the sandbags. One was killed at this control point on the corner and another one was killed back about 150 yards in the rear of the border by a stray round that came in. We used in the neighborhood of about 5,000 sandbags in this area to keep the troops protected.

Ambassador Martin: Thank you. I think that concludes our presentation, Mr. Chairman, of the military operations. Do you have any questions? General O'Meara will be happy to answer them.

Chairman Plate: We would like to know how many casualties you had.

Colonel Sachse: My casualty list, sir, I had 3 personnel killed by gunshot wounds. I had 15 personnel wounded by gunshot wounds. That gave me a total of 18 either wounded or killed by gunshot wounds. Then I had 83 who were injured by rocks, Molotov cocktails or sticks or something that was thrown at them while they were on the front. These casualties consisted of cuts on the face, arm cuts, in some way or another, either rocks or glass flying through the air. They were rather minor but they still required medical attention. Does that answer your question?

Chairman Plate: Yes, sir.

Ambassador Martin: Any other questions?

Ambassador Marinho: (By Interpreter) Has any American military airplane entered the Panamanian air space while the incident was taking place?

Ambassador Martin: Do you want to talk about the airplanes we had flying the first day?

General O'Meara: Yes. When I assumed responsibility in the Zone at the Lieutenant Governor's request I had a

proclamation issued calling on all persons who did not live or work or go to school in the Zone—see, we had students who lived in the Zone so that they can go to school in some cases—to leave the Zone immediately. Then I had a small airplane, a light airplane with a loudspeaker on it get up and make this announcement both in English and in Spanish. And when this airplane first appeared and made the announcement in Spanish it was of some assistance in clearing the Zone because a number of people, the Panamanians, the rioters who were in the Zone, withdrew. Unfortunately only momentarily.

Ambassador Martin: This was a small, two-seat airplane, about like a Piper Cub with a loudspeaker system on it.

General O'Meara: Due to the urgings that they received in some cases or perhaps for other reasons, they surged back into the Zone again. This was before the troops got there and when only the police were there, but it is also one reason that where there had been deep penetration of the Zone at the Ancon Laundry, for instance, and at the freight stations. They did withdraw, and as General Mabry told you there were large numbers in the Zone there, but they were not as far forward as the point at which they had burned some cars and where they had broken windows in the Ancon Laundry. The earlier time the police were able to move forward and the rioters never penetrated quite that deeply again at that point.

Representative: Did that plane ever fly over the Republic of Panama?

General O'Meara: To my knowledge it did not. It flew along the boundary. Now whether in making a turn it might have crossed over the boundary I can't say. But the street was lighted and I think it did not fly over the boundary.

Ambassador Marinho: (By Interpreter) I have another question. I was informed that the American forces occupied four places in the Republic of Panama, and if so, for how long?

General O'Meara: We occupied no places in the Republic of Panama. The checkpoint was established—

Ambassador Martin: Did you say the Republic of Panama?

Ambassador Marinho: Panama City.

General O'Meara: No. Absolutely no place in Panama City. At no point did any troops cross. You see, all of 4th of July Avenue is part of the Zone up to the curbing, up to the sidewalk on the far side. At no time did the troops cross 4th of July Avenue or Kennedy Avenue, or the police before the troops got there. To the best of my knowledge I am sure this is true too because the police were all deep within the Zone until the troops pushed them out. In fact, as you saw in the pictures we did not try to clear the mobs off 4th of July Avenue even though this is on Shaler Triangle, even though this is a part of the Zone. We made no attempt to clear them, not in the interests of establishing a legal principle, but of using a minimum of force on this side of 4th of July Avenue. On our side there is some sort of fencing and part of the distance there is a wall, so that this was a convenient place where we could restrain them if they did come over the wall. They were limited to shooting at us or throwing things at us. Once they got over the wall, inside it, then our civilian housing area, the buildings, were immediately available to their incendiary acts and it made the area very difficult to protect. As long as we had them on the other side, we could hope to restrain their Molotov cocktails with the fire department. So I felt it was prudent never to try to make any move against them as long as they stayed on 4th of July Avenue.

Ambassador Martin: I would like to add that I have not heard in my stay here a suggestion that we had entered Panamanian territory in the Panama City area and consequently our presentation has not dealt with that problem at all.

General O'Meara: This did not occur.

Ambassador Marinho: Thank you. I have another. (By Interpreter) What about the tanks? It is not very clear. What kind of vehicles were these tanks?

General O'Meara: Do you have some pictures there? We have three different infantry battalions in the Army forces stationed in the Canal Zone. One is a conventional infantry battalion which, when transported, is transported in trucks. Another is a paratroop battalion and the third one is an armored infantry battalion in which the troops are transported in armored personnel carriers. Each vehicle holds 12 men, an infantry squad of 12 men plus a driver. This is a diagram of it. Now we have this vehicle in the Zone as well. This is a training picture and has nothing to do with this exercise. This is an anti-aircraft weapon and these are put in positions when they have an alert around the locks and around the generating stations to defend against aircraft. These were nowhere near the border however. This is a tank; this is a true tank. Now this is what a tank looks like and this is what an armored personnel carrier looks like. This is what we use. The personnel carrier has $\frac{1}{4}$ inch of armor on it.

Ambassador Martin: Isn't it aluminum?

General O'Meara: Yes, this is aluminum. Wait a minute. Yes, the old ones had $\frac{1}{4}$ inch steel. This is aluminum and it's—I forget what gauge aluminum it is. It's hardened aluminum.

General Mabry. It will deflect rifle fire, that is about all.

General O'Meara: Yes, it will protect the men riding inside it from mortar fragments, from small fragments of

artillery shells, from rifle fire if it isn't too close and too high powered a rifle. At a distance it will deflect rifle fire. In this age of atomic warfare they are very important because they will protect the infantrymen riding inside them from the flash burn and from radiation and from a certain amount of blast from atomic weapons. All our infantry in Europe, for instance, are now equipped with this type of armored personnel carrier. I used to be in research and development and I had quite a bit to do with helping develop this vehicle.

Ambassador Martin: It does not carry offensive—

General O'Meara: It has no cannons. It has a machine-gun that can be used to protect it against attacking aircraft or, of course, the machine gun can be used against ground troops as well. One machine gun mounted on top of it. The rest of it is just infantry squad with its own infantry weapons. In our Army we teach that the infantry squad always dismounts from this vehicle in order to fight. The Germans have a different theory. They think sometimes you should fight from inside the vehicle. This is a tactical argument of course.

Ambassador Martin: But there is no means by which they could fight from within the vehicle, is there?

General O'Meara: Well, they can, I guess, raise the top of it but then they have to stand up and shoot out.

Ambassador Marinho: (In English) Thank you. I am satisfied.

Mr. Oribe: We would like to ask you General, these armored personnel carriers, when they were near the border, did they carry their machine guns on them?

General O'Meara: Yes, the machine guns were mounted on them. However, none of them had machine gun ammunition. No machine gun ammunition was issued to any troops during this incident.

Ambassador Martin: I think it's also fair to say from my personal observance that they came up and dropped the troops and then went back to an assembly area behind the Tivoli Hotel, and when the Peace Committee was there, went around on a Monday, they saw them behind there in the assembly area and they got direct observations of these personnel carriers at that time.

Mr. Oribe: So these personnel carriers were called tanks by the Panamanians?

Ambassador Martin: I think so.

Mr. Oribe: And let me ask you, General, another point. I had some information to the effect that not only the U.S. Army soldiers fired but that civilians from the Zone also fired on Panamanian crowds. Do you have anything to say on that?

General O'Meara: I have no evidence to support that whatsoever. I am sure that after my troops took control there was no shooting from within the Zone because if there had been my troops would have investigated it immediately. My officers had full responsibility for maintaining order and discipline among their troops and anyone else in the area. Now before my troops arrived on the scene, of course, I had no observation under my immediate command; I can't speak as to this except that it seems to me the situation developed rather rapidly and it seemed to me quite unlikely that any of the civilians would have gotten involved in any shooting at this time.

Ambassador Martin: I note that the Panama Canal Company when they were in charge has no evidence that there was any shooting by civilians other than the Panama Police. They have checked this.

Mr. Oribe: Has an inquiry been made of this subject or have you inquired of the civilian authorities?

General O'Meara: I have made no investigation of anything that happened before I assumed command. This is not my responsibility. I am sure the Governor has looked into this but after I assumed command my officers had responsibility for investigating anything of a suspicious nature, for permitting no disorderly acts of any sort, and I know there was no shooting once the troops had deployed in position and taken over.

Ambassador Martin: I think that it was noticeable for quite a period after you took over your troops were not doing any shooting and if any shooting had come from our side they would have quickly heard and noticed it.

General O'Meara: They certainly would. At no time was there enough shooting from our side so that any other shooting from our side would not have been noticeable. There were never any large number of shots being fired. Designated men, who were doing any shooting at any given time, were controlled by their officers or by a designated noncommissioned officer.

Mr. Oribe: Thank you very much. May I ask you another thing, sir. Could you tell us if, according to the information you have, if there was any organized leadership on the part of the crowds, sharpshooters or snipers, was there some sort of coordination behind the whole thing or was it just a spontaneous reaction from more or less excited people?

General O'Meara: No. There were definite indications of leadership, particularly during the time that the mobs of which you saw one marching down the street in the movie. At the time that these mobs were being formed and being incited to additional action there was well organized leadership, the leaders being equipped with loudspeakers and several of them working in conjunction with each other.

Ambassador Martin: I am going to say something more about that in my summary.

Ambassador Gavito: I have a question. Were there snipers in the Instituto Nacional Building because we saw many bulletholes in that building?

General O'Meara: There was some firing coming from the Instituto Nacional early in the game but it was not troublesome for long.

Ambassador Gavito: The bullet holes there are very small bore which would indicate that they are from a .22 rifle.

General O'Meara: We never fired any .22 rifle of any sort. We have not issued any to any of the troops. Neither did the police. No .22 rifle was fired by any American, I can say that with certainty. Certainly not by any military. I know the police were not equipped with .22 rifles also.

Ambassador Gavito: That has lead the Panamanians to believe civilians were firing at that particular building.

General O'Meara: I think the Panamanians are correct. In my opinion there were civilians firing, Panamanian civilians.

Mr. Oribe: But did the U. S. Army troops fire against sharpshooters?

General O'Meara: No, we never brought any fire against the Institute.

Ambassador Martin: When the military were in control.

General O'Meara: When the military were in control we brought no fire against the Instituto Nacional.

Ambassador Gavito: I have another question. Colonel Sachse, in the Colon area you mentioned only a shotgun. Did your troops ever use any of the kind of firearms other than shotguns?

Colonel Sachse: On that, sir, I would say that, with one exception, at no time during my operation on the Atlantic

side was ammunition used in any way. I will say no ammunition other than shotguns was used against the Panamanians firing into the Republic whatsoever. I did request in the early morning hours of the 10th, when we were getting heavy sniper fire, to put out the lights up and down the street to the rear of the YMCA. The snipers in the rear of the Commissary building prevented us from getting out there to put them out. We were trying to get the lights out so we could go back and forth to the Masonic building without being seen.

General O'Meara: In other words he shot out street lights. He was given authority to shoot out the street lights in the Canal Zone and he used rifle fire to do that.

Colonel Sachse: Now in doing that my Executive Officer, who is my assistant, personally supervised. We had permission from higher headquarters to do this and he fired 8 rounds of M-1 ammunition and 2 rounds of caliber .45 ammunition to shoot out these lights. The 10 rounds of rifle ammunition and pistol ammunition were all that we fired during the complete operation.

Ambassador Martin: I think it's also interesting that the Colonel, the Battalion Commander, had to go to higher headquarters to get permission to fire rifle ammunition at street lights. That is how firing was under control and that was the pattern that General O'Meara set everywhere.

Colonel Sachse: That's correct. My orders from General O'Meara were that live ammunition would not be fired at Panamanians under any conditions unless he personally approved it.

Mr. Oribe: Let me ask you another question. When your troops under sharpshooter fire you can at your discretion and considering the danger to your troops, authorize controlled fire against them?

General O'Meara: You will recall, Mr. Ambassador, that there was a riot here in 1959 and I took command here in

1961 and when I came here in the spring of 1961, just about 3 years ago, February of 1961, I looked at the plans which had been used should there ever be another riot. At that time the Governor of the Canal Zone was Governor Carter. We reviewed the plans very carefully together. We arrived at an agreed plan and this plan specified very carefully that only minimum degrees of force would be used initially and each degree would be authorized by a senior commander. If I were not on the scene then it would have been another senior commander. Only a senior commander would be able to authorize an increase in the level of force. Now this is our regular plan that we worked out. That order even specified that tear gas would not be used until it was authorized by a senior commander. However, at the time that the Lieutenant Governor Colonel Parker asked me to assume responsibility and take charge of all operations, the situation was already so acute and there was already this large number of mobs, unruly mobs in the Zone that in giving the orders to the troops to clear the Zone and to seal the borders I told them to use tear gas from the first, as I felt it was the only way it could be done and this was the minimum level of force which we could use in order to get them out with the least injury and damage possible.

Ambassador Martin: In fact that was a reduction from the level of force which the police had had to use.

General O'Meara: The small number of police, of course, who in many cases ran out of the limited stocks of tear gases had already used gunfire, but when the troops came in the troops were not authorized to use gunfire; they were not authorized to fire their weapons, but they were authorized to use tear gas from the first and they did.

Ambassador Martin: I would point out to you too, General, that from my recollection it was late Saturday or early Sunday that you stopped counter-fire against the

snipers and, for example, all the night of Sunday-Monday when there were about 800 rounds fired and you were not responding.

General O'Meara: We were not responding at that time but by that time we had withdrawn the troops to positions from which it was difficult for them to be hit. We had sandbagged the windows in the Tivoli so that the people who were observing from up there were not likely to be hit and at this time we stopped counter-fire. Now we stopped, but the sniper fire resumed several times you recall as General Mabry told you. The first time was when I called Foreign Minister Solis and asked him to please have the Guardia Nacional stop the sniper fire and that I would be glad to stop the shotgun fire if he would do this and he said, "I will assure you, General, that it will be stopped." "I will call the Guardia Nacional right now." We stopped it for several hours at that time and there was a slight decrease in the sniper fire then but very slight and it resumed almost immediately. Then later on after we were taking more and more severe casualties I authorized selected rifle fire and again we ordered that to be stopped. But from about Sunday on we never fired another round though a great deal, in fact one night after that I would say there was more than 700 rounds fired by snipers.

Ambassador Martin: At us?

General O'Meara: At us. We never fired a round.

Ambassador Martin: The basic principle was that as soon as our soldiers were protected by the positions they were able to take and they didn't have to get out in front to move back rioters, then we did not respond to sniper fire.

Mr. Oribe: Thank you very much.

Chairman Plate: (By Interpreter) General O'Meara, Mr. Plate has two questions. One, in order to clarify the

allegations concerning the fact that our troops might have penetrated into Panamanian territory in Panama City, possibly in pushing the crowds back out of the Canal Zone. He has three specific points where we are alleged to have penetrated in the City limits. Avenue A and 27th Street.

General O'Meara: That is one of the most used entrances to Panama City. The troops at no time went over more than half-way across 4th of July Avenue. You were there at the time, George. Could you—

General Mabry: Yes, sir. At no time did any troops go further than the middle of 4th of July Avenue in that area. Now in addition to this—along this area of the boundary, it is about 10 yards further over into the Republic of Panama than the curb along Kennedy Avenue. It runs about 10 yards on this side of the Isthmus of the Thatcher Ferry Bridge.

General O'Meara: What he is saying is that at that particular point the troops were always more than 10 yards from the Zone boundary.

General Mabry: And after the next morning, well, that night when the barrier, the wire barrier was put in, it was put in about 50 yards from this side of 4th of July Avenue.

General O'Meara: It was about 80 yards from the boundary there.

General Mabry: The men remained behind the wire barrier. At no time did they get over that into 4th of July Avenue.

General O'Meara: Here we stayed well back from the border. Can you tell about the position of the troops there?

General Mabry: On the 10th, there was a group of about 25 or 30 young boys, around 18, 19 years old, who came in this area and were permitted to get within 15 yards of the Ancon Laundry. They were throwing rocks at the MP's—

a few MP's on the check point. The Army Lieutenant in charge of about 25 soldiers in that area, who were behind this building, had to move out to the check point, which was just about 20 yards from the Ancon Laundry, in order to protect the Military Police. He used a riot formation, did not go further than the junction of Roosevelt Avenue and the junction of Frangipani here, and used tear gas grenades. The boundary is at least 200 yards from this point.

General O'Meara: At no time during the night—the first night—did the troops go anywhere close to the entrance to Automobile Row; they stayed on this side of Kennedy Boulevard. As I told you, we never tried to clear those broad avenues completely, not even on the first night. Later on the troops were withdrawn behind a hedge, all the way back here (indicating on map), and they stayed there. At no time did any troops—and orders were strict on it in the plan and they were observed—at no time did troops go outside the limits of the Canal Zone. In fact, they contented themselves with—I think the farthest penetration that was made anywhere, in terms of “penetration”—the closest that they came to the far side of the street which was here (indicating on map) at what is called Avenida “A” and 27th Street, and there they stayed off—they only went to the middle of Fourth of July Avenue.

Ambassador Martin: May I say something that has a bearing on this, that, at one point in the Peace Committee, the Panamanians raised the question as to whether it would be agreeable to us for the Guardia Nacional to maintain order in those parts of the Canal Zone which were Shaler Triangle and Fourth of July and Kennedy Avenues. And, we responded immediately that this was what we had been asking them to do because we have not been trying to go up that far to maintain order. But their request to do so would be indicative of the fact that they felt we were not going out there to do it, and they wanted permission for themselves to do it. And we agreed to it immediately.

General O'Meara: There is only one other point I'd like to add. All along the Instituto area, the troops stayed on the high ground up that way (indicating on map).

Ambassador Plate: One other question, sir—On the Legislative Palace wall facing the Tivoli Hotel over one of the windows, there is a spray of shots which could appear to be made by automatic weapons fire.

General O'Meara: It was made by a man who had a clip—an M-1 rifle—he had a clip of rounds. In fact, it was made by the man you saw firing. He shot several times—the young soldier. He was a good shot, but he apparently got a little excited when his friend was shot alongside of him. He fired about the number of rounds in his clip, one after another, aimed; but it was dark and he wasn't aiming very carefully. He was aiming at a window. It was a clip of an M-1 rifle, and the first time he ever fired a gun in anger, no doubt, and he didn't do a very good calm job of it. It was not semi-automatic. He fired each one with a single fired shot, you see, something like—he shot and then he'd shoot again and he'd shoot again.

Ambassador Martin: With a clip in, you can fire very rapidly.

General O'Meara: You see, he pulled the trigger for each one. But he was shooting at that window, and he didn't get very close to it; he wasn't doing a good job of shooting. And, he didn't aim enough between—he shot, and then he shot again, and then he shot again. And just then he saw a friend of his shot and he was trying to get a shot into that window. He pulled the trigger on each one, not aiming carefully enough to get his shots inside the window—bang, bang, bang—that's the way he fired the whole clip.

Ambassador Plate: Does this weapon convert to automatic fire in a moment?

General O'Meara: It can be done if you—

Ambassador Plate: But does this particular weapon have some sort of instrument on the weapon itself that would convert it to automatic fire?

General O'Meara: No, no. The most it does is semi-automatic; you have to pull the trigger each time. It's not like a tommygun where you can pull the trigger and spray it.

Mr. Oribe: Can I ask you another question, General? Did you have groups of sharpshooters firing during this time?

General O'Meara: Well, there was one shown here, and I think there is a little more footage—we showed all that's there—we haven't any more film, just what we have here. There was one picture of the young soldier; you can see him shoot about two shots and you can see him recoil each time.

Mr. Oribe: Well, let me ask you another question, sir. You know that, of course, at the beginning of the whole incident, we had a program of flags at the high school. And, of course, you must have been aware that, on the 7th of January, students decided to protect the flag and prevent the authorities of the school from lowering the flag, as was the order from the Governor-General. Now, did you have any reason in your report to anticipate that this situation might create or develop into an incident with the Panamanian within a short time?

General O'Meara: No, I had no indication that this was going to—my intelligence officer had no indication that this would create an incident of any sort—we had no intelligence indications.

Mr. Oribe: But all the newspapers of Panama carried the story, front page.

General O'Meara: Yes, but they had done this previously. This was not a new affair. I mean, from time to time,

especially when the discussions about flying the flag were being—at the time when one of the employees of the Panama Canal Company filed a civil suit against the Governor for raising the flag. There was a great deal of discussion in the Panamanian newspapers about the flag. So that this was not something which was wholly unusual.

Ambassador Martin: I think that the only really sensational play that was given prior to the incident was the Thursday morning issue of *La Critica*, which did so; otherwise, it was reported fairly factually. So we had not been led to believe there would be a problem, either in the Embassy or by the Governor in leaving or in discussing with Solis that afternoon whether he saw any reason why he shouldn't go, which he said he did not.

Mr. Oribe: Well, thank you very much.

Ambassador Martin: I have a little summary. I will wait until the Chairman returns.

(There was a short recess.)

Ambassador Martin: Mr. Chairman, we have appreciated this opportunity to present the facts of the developments as we have seen them. I want to do a very brief summary of the conclusions we reached, some of the problems we see, and certain evidence that didn't fit into any of the things that have been presented to you thus far. I have about five points to deal with.

The first point is on the flag incident. It seems to me that we were trying our best to settle the flag problem amicably and in accordance with our agreement with the Panamanian government. Governor Fleming, as he indicated to you, had every reason to believe that an amicable settlement involving flying both flags—U. S. flag and the Panamanian flag—at the Balboa High School was about to be reached when he left for the States. Now, as you know, subsequently Secretary Vance, on Saturday the 11th,

ordered that both flags be flown at all U. S. school locations in the Canal Zone. And, I believe it was on Wednesday morning following, the 13th—wait a minute, I'm sorry—the 15th, when school was reopened after the incident, that both flags were flying in front of all the schools. In connection with the student movement itself, it seems to me we took every possible precaution to prevent an incident involving a personal clash between the Panamanians and Americans. We felt, as Colonel Parker indicated, that we had been successful, and the people were leaving the Zone without any incident. The people were leaving without any injuries having taken place. And there was every reason to expect that, if the Panamanian authorities had responded to the call, which we had made to them in good time, to disperse the students—and, assuming this was just a student demonstration and not part of any thing bigger—it could have ended there.

Unfortunately, it did not end there, and there was subsequent violence. With respect to that violence, as long as the police were in charge, I think it is clear that they did their best, with tear gas and the other means available to them, to prevent attacks on American homes and property and lives in the Canal Zone. They were preventing them from attacking, being attacked by mobs who were committing arson on American and Panamanian property, engaged and bent on acts of violence. In time, to stop this, they were forced to use weapons fire over the heads of the mobs and into the pavement in front of them. The soldiers, when they took over, used tear gas and confined themselves to fire only on a selected basis against snipers, and then only until they had gained protection for themselves. And, for long periods of time on both sides of the Zone, we suffered sniper fire and casualties, without response.

I think that it is fairly clear, from where we sit, that the violence the night of January 9th involved large numbers of people and was a fairly uncontrolled emotional outburst

that was striking out at everything, Panamanian or American. But, in the remaining 3 or 4 days, we were dealing with relatively small crowds who were being exhorted by individual agitators to new acts of violence and with a small number of well armed and skilled, well supplied with ammunition, snipers. There seemed to be a substantial difference in character between the violence addressed to the Canal Zone, its property and its citizens, on the 9th and that on the 10th, the 11th and the 12th. I think that one of the real questions is why, in a situation of this character, the violence was maintained over such a prolonged period at the level at which it was maintained, and in the manner in which it was maintained.

Just one final point about the violence—we, of course, do not have any authentic information about the Panamanian casualties. We have seen their press reports. We have seen also press reports indicating that somewhere between 5 and 7 of those who died were suffocated in the fire in the Pan American building. There are other reports of causes of death among the Panamanians, enough to lead us merely to suggest that to attribute all the deaths and casualties to U. S. action is probably not accurate and deserves—justifies careful examination.

Now, the question that I want to come back to is why this violence was so prolonged and took such sharp and aggressive character against U. S. personnel. The first point has to do with the cooperation of the Panamanian authorities. We have recounted to you a number of cases, starting just after the students had left the Administration building, in which we had sought from the Panamanian authorities at various levels, including the established channels for dealing with violence, namely, the Guardia Nacional, their cooperation in restraining the Panamanians in Panama where we, obviously, could not deal with them. And, we had invited them to disperse the students. We invited them, on several occasions, to clean out snipers and

did, in fact, withhold counter-sniper fire to give them an opportunity to do so in safety. We invited them to set up a Colon Corridor road block to protect Rainbow City from the mob moving down. We invited them, on numerous occasions, as they have done in the past, to control Shaler Triangle and Fourth of July Avenue—this was even done formally through the Peace Committee, when they were here, when they asked if this was all right. But, until Monday morning—3½ days after the start—effective action was not taken by the Panamanian authorities, for reasons, which we are not aware of, it was not taken; for reasons, which we are not aware of, it was taken on that Monday morning, and, in the early hours, with no great difficulty as of that time. Snipers were cleaned out of the Legislative Palace, cleaned out of the area around the Masonic Temple in Colon, and there was no sniping from then on.

There is one little additional point on this. We were informed through proper channels on the 10th that the Guardia Nacional might need some additional tear gas. We loaded a truck with the tear gas that they had requested and put it by the back of Curundu gate and it was picked up on the night of the 12th. Why this delay in accepting assistance in dealing with the mobs is a question to which we have no answer. Certainly one would think that one of the factors in the prolonged violence must have been the fact, the reason for which I cannot explain, that the Panamanian authorities did not take the action prior to Monday morning which at that time they did take quite effectively.

Now, secondly, there is the question which has been much discussed of the role of leftist extremists in the violence which took place. I think that there is some evidence for believing that the promulgation of the crisis and its acutely violent character during this three to four day period, the speed with which the people even on the night of the 9th, developed a capacity for rock throwing and Molotov cock-

tail throwing and then for firing at us with automatic weapons which are not easy to come by all suggest that there was some kind of organized activity and support of violence. I don't want to confuse this with the attitude of the Panamanian people on the issues between them and us with respect to the treaty. You are aware of that situation. What I am talking about is the acute violent form for this prolonged period which the action took.

I believe also we have mentioned to you the trucks with loudspeakers which toured Colon. We called the Panamanian authorities to pick up a loudspeaker truck which was constantly putting out the most inflammatory incitements to violence, which would be a simple task. They were not picked up nor was similar incitement to violence on this side. Just as one example of this, you will recall that on Saturday afternoon we had three different attempts by the crowds to move out of the Shaler Triangle into the area around the Tivoli. We had one or two attempts elsewhere of mob violence 48 hours after the original incident. At the Peace Committee meeting that night I said that we had information, we had observed known leftist extremist leaders talking to the mob in Shaler Triangle and inciting to these actions. The Panamanian's representatives said that it would be helpful to have the names of these people so they could get them out of circulation and stop this incitement to further violence. We gave them the names of ten people that we had observed. They were all well known leftist extremists in Panama, well known to the Guardia Nacional. When we gave them the names they indicated as much. The next noon there was a funeral procession for the Panamanians who were killed and six of those ten people were in the front row of the funeral procession and no apparent attempt had been made to pick any of them up or prevent them from undertaking further incitement.

We wish to point out to you some of the kinds of people that were providing a certain degree of leadership and

incitement to the mobs which were roaming the streets to continue the attacks, keeping it going into the 13th and backing up the sniper operation. We have three pictures taken during a rally which ended up with speeches in front of the Presidential Palace on the afternoon of the 11th, and when President Chiari came out on the balcony and made a speech. I would like to show you a shot, just point out some of the people who are there (Pointing to photo—Slide No. 26). The first gentleman here is an official photographer—for the Guardia. They knew these people were here and were keeping a record of it too. The second person is over here holding the flag. This is Pedro Rivera, a member of the Communist Party and a leader in the University Students Union. The next one, this gentleman here with the glasses, is Eligio Salas who is a member of the Communist Party. He is President of the University Students Union which is dominated by the Communist faction at the University of Panama and has been a very active pro-Castro-Cuban speaker in Panama for some time and is well known.

Next, this is a similar picture here (Pointing to photo Slide No. 27.) You see the girl. This is Virginia Ramirez who is a member of the Communist Party. She is a former student leader at the School for Girls. She was active in the '58-'59 riots and she was active with the Communist Party while attending school in Brazil during the past year. Then we have here with his face turned away but identified very clearly by our people who know him—Cecar Carrasquilla, a Communist, an active member of the student group of the National University. Also active in the VAN which is a Castro controlled and financed organization which has been active in all of these events and in previous events. This particular gentlemen left on February 6 for a trip to the Soviet Union. We don't know whether he has returned yet or not, but he as well as those other people make these kind of trips fairly regularly. Then we have as number six, a gentleman in the

checked shirt right here. Alberto Calvo, a Communist and leader in the National University who has studied in the United States but is back here and very active in the University Communist organization.

Next one. Here we have one of the very active—yes, this gentleman right here, Floyd Britton, one of the best known Communist leaders in Panama. He had four months training in Cuba. He has also been in training courses behind the Iron Curtain in the Soviet Union and is an active member of the Communist Party and particularly active with the students. And then here speaking at this point (Pointing to photo—Slide No. 28) is Huberto Bruggiatti, also a member of the Communist Party and active in the VAN to which I referred previously. He has traveled to Cuba. He was there for the anniversary of the Cuban Revolution both in 1960 and 1961.

This, I think, gives us a brief idea, that is all, of some of the people that were playing an active role in the front row of the demonstrations. It was these kinds of people that were in Shaler Triangle talking to the crowds and urging them to move into the Zone. Now I don't—as I said before, I don't question the feeling of a great majority of the Panamanian people but it does appear there might be some reason to believe that the organized violence, the continuation of the violence owes something to the desires of the people like this to keep the Latin American scene in a state of turmoil and to damage relations between the United States and one of its friends.

Also we will have in our exhibit further materials from the Panamanian press and radio which are of a kind which could have no purpose other than to prolong the violence and agitation to serve outside interests. I talked about these two factors in the prolongation of the serious violence which I think has made it more difficult to solve the problem. I don't attempt to assign degrees of responsibility in this matter, but I would suggest that a group

such as yours which has access to information from both parties should find it of interest to see what can be found out about the degrees to which these two elements, the reluctance, the slowness of the Panamanian authorities of taking action on their party and the interests of certain groups in prolonging the violence may have had in causing this to become as serious an incident as it did rather than something that was over with when the students left, or at least over the night of January 9.

Now in closing I just would suggest that we feel that the evidence is quite clear that we did not at any point invade the territory of Panama. We did not, as has been frequently charged, use tanks or cannons or machine guns or airplanes, weapons of this kind. On the contrary we exercised what we felt was maximum restraint, only using force to the degree necessary to protect lives of Americans and that in fact if one would get down to the point of aggression one could make an argument that it was the Panama Canal Zone that was attacked rather than vice versa. Thank you very much.

Mr. Oribe: Mr. Martin, we had assumed no inclination for the known participation of the La Guardia Nacional in the first, shall we say of the incident when everyone was afraid that the Guardia Nacional might be involved in hostilities or shooting with U. S. Army, they wanted to prevent that, and another one is that La Guardia Nacional would not take action against their own people because of accusations that they were not patriotic. I would like to hear a comment on that.

Ambassador Martin: Let me just say something first, if I might, Mr. Ambassador. In the first place, when we first asked for assistance when the students were leaving the Canal Zone there were no U. S. troops around. There was no large group of Panamanians around so that neither of the points would in my judgment have applied. Secondly, during the period from, shall we say the morning of

the 10th until the following Monday morning, the 13th, there were several occasions on which we held fire and there was every evidence by direct communication and through Peace Committee of a willingness to cooperate with the Guardia Nacional in getting the situation under control. And, secondly, during that period there were not the enormous crowds that would have to be dealt with such, as the five or six or 7,000 that was performing the night of the 9th. Now the only other comment I would make is that if the La Guardia Nacional felt that it was unable for political reasons to deal with the Panamanian crowd on the 9th because of the effect on its reputation they could hardly protest too much if we were then forced to use our peace-keeping equipment in order to prevent the loss of lives in the Canal Zone.

General O'Meara: I think the danger of any conflict between the Guardia Nacional and the U. S. Military forces in the Canal Zone is very remote, very unlikely indeed. The Guardia Nacional is a very small force considering the large responsibility which rests upon it. It is a well trained force for which I have respect and for which my officers and my men have respect. I have served in my 33 years of commissioned service in a good many parts of the world where there is a feeling of animosity between the local police and the military including some stations in the United States some years ago. There is none of that between the Guardia Nacional and the military. The only other place where I have seen an almost complete lack of animosity between the soldiers, even the drunken soldiers, and the police is in Germany. There our occupation forces feel that the German police are taking care of them and not trying to persecute them or to throw them in jail, and they don't. They take them home and bring them into the barracks, turn them over to their military leaders, their sergeants, when the soldier gets into trouble, when he gets too much beer under his belt or gets into a fight with some local hoodlum. The same sort of feeling exists between the

Guardia Nacional and the soldiers here in the Canal Zone. It's been a matter of great satisfaction to me in the past and this sort of thing, this sort of feeling carries through under times of great stress such as we were experiencing here on the 9th and 10th and 11th and 12th. I considered the possibility of action, even accidental action, between the Guardia Nacional and the U. S. military very remote.

Ambassador Martin: It is true that during a considerable period your liaison officer continued to be in the headquarters.

General O'Meara: We communicated with the Guardia Nacional both by telephone and by radio, and by liaison officers.

Chairman Plate: Mr. Martin, we thank you very much for coming, and gentlemen, thank you very much.

(The council was adjourned at 12:30 P.M., 15 February 1964.)

Film Narrative by Mr. Baldwin (See page 14 [116a])

Here are the North American students at the Balboa School as well as a few adults, or the parents of the boys. Then on the other side of Gorgona Street are the Panamanian students of the Instituto in front of the Administrative Building. Only the Panamanian flag flies here. Here they are talking to Captain Wall and the police is holding back the 200 in this part. The Panamanian flag only again. Here they start to walk across Gorgona Street in direction of the school. Here you can see the torn flag through the boy's shirt on the other side. (The shirt can be seen through the torn flag.) Here are the other students, the North Americans, waiting. Here is where an explanation is being given to them. They are asking for the Panamanian flag to be raised on the flagpole. Everybody watching. Here is where they are being told that the ceremony cannot be held. I want you to watch this boy who is here with an open book, where you will see other

actions of this gentleman. Here they are arguing between themselves. Here they have started to push the students back when they left. Here is where one fell and got up. Here he continues with the flag. And here when they started (voice interrupted) the two flags, yes.

Film Narrative by Mr. Baldwin (See page 23 [122a])

Here are Major Urrutia and here are the students on Kennedy Avenue in the Canal Zone; and here they are breaking the oil tanks they took from the gasoline station in front. This here is the bus station in the Canal Zone by Shaler Triangle and you can see them stealing the equipment, breaking everything inside, breaking the loudspeaker, the bus system. Here they are trying to set the bus station on fire. Here there is also a car on Kennedy Avenue in the Canal Zone. (2nd voice) Ancon Laundry. Here we have the boys who are on Kennedy Avenue in the Canal Zone breaking the building of the Pan American which is in Panama. Here they have set everything on fire. You can notice that there is no unit from the Panama Fire Department. Here we are on "J" Street and Kennedy Avenue where cars with Canal Zone plates are being burned. Here we are on the same Kennedy Avenue next to PAA and KLM. Here they have pushed a car into the building and there is where the fire started. This scene is from the Zone into Panama. There the cars are being pushed again. The Pan American (building) again. Here they are removing all of the Braniff equipment. Burning the building. Here is the mob in front of Shaler Triangle. Here they are breaking the signs in the Zone. Here is President Kennedy Avenue in the Canal Zone where they are breaking the signs.

Transcript of Tape Recording (See page 36 [132a])

Light planes are covering the events from the air, we don't know what their objective is, but the planes are flying over the streets and the crossings, the public and

are in Panamanian air space . . . and the position of the planes on this flight are keeping Panamanians in an intense state of nervousness, who think they might be the object of a aerial bombing . . .

. . . where most of the members of the Canal Zone police are deployed, armed with rifles and sporadically engaged in the sport of firing toward Panama

. . . to offer the latest news coming from the front, from the war front, the firing line . . . at this moment, 6 war tanks of the United States Army have just come upon the scene to try to snuff out the patriotism and the fervor of the Panamanian people. And we are turning the microphones over to our colleague (name unintelligible) while we go to the firing line to report on the latest events. Six U. S. Army tanks are poised, awaiting orders to go into action and fire upon the Panamanian people. Just now, moving along John F. Kennedy Avenue are several United States Army tanks . . . they are moving along Kennedy Avenue, pointing their cannon toward the Panamanian sector . . . Here again is my colleague Homero Valazquez . . . a Panamanian youth, with great courage, had in his hands a Molotov cocktail and jumped at the tank with the Molotov bomb—fortunately he was unable to reach it.

. . . It seems incredible that the United States Army, that has defended freedom and democracy in such far away places as Korea, China, Africa and all parts of the world . . . here in Panama, that same army is an instrument of terror and persecution, to snuff out the patriotic aspirations of freedom-loving people, who seeks to exercise their full sovereignty in the Canal strip.

. . . We repeat—Panamanian people, we have just been informed that a United States Army tank is practically in Panamanian territory, with its menacing cannon muzzles pointing to the crowd. The people are incensed over this newest outrage. It has already entered Avenida

Nacional . . . practically . . . the situation is extremely grave . . . extremely grave. It seems that the tank is advancing along Avenida Nacional. The tank is in Panamanian territory, gentlemen . . . It is necessary that our country ask for a meeting of the Security Council, because of the aggression by the United States Army . . . We repeat, the army tanks are already here, on Avenida Nacional, in Panamanian territory, and behind them is a heavy concentration of United States Army troops and the people have had to fall back to avoid the brutal aggression by the North American Army against the Panamanian people.

At this moment we are told here at the operations center on Avenida Nacional across from the Good Neighbor Bar, that some Panamanian elements, now properly equipped with war armaments, have managed to obtain some Molotov cocktails and a platoon of Panamanians, in a suicide move, have just attacked one of the tanks and threw themselves upon the tanks, and they threw a Molotov cocktail against the tanks. We repeat, a platoon . . . etc.

We have just witnessed the most beautiful spectacle our eyes have ever seen—four youths, none older than 18, each armed with a bottle of gasoline. They grabbed an empty fifty gallon drum—any old drum—and started to roll it toward the armored car which is stationed about 60 yards from the Limits here. They are writing an extremely beautiful saga of courage.

. . . For if we were armed, we would be in the heart of Quarry Heights, demanding the head of Fleming and all the other traitors and bums of U.S. politics. Here all we Panamanians, united under the National flag, with no partisan differences, will be on the firing line at every moment to battle those who believe our country is a protectorate . . . We are going to show them that here there is dignity, honor, patriotism . . . The Panamanian people today have taught a lesson to the North American fools,

to the Latin American people, that it is a country willing to defend its sovereignty, the Canal Zone.

Panamanian people! Upon our Panamanian land . . . in these moments of crisis that our Republic is experiencing, where men are shedding their blood, where youth has given its life, it is not possible for the people to remain in their homes. It is necessary to come forth to defend the country in these difficult times.

Cross-Motion for Summary Judgment

Plaintiffs move the court as follows:

1. That it enter, pursuant to Rule 64 of the Court of Claims Rules, a summary judgment in plaintiffs' favor for the relief demanded in the petition on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) The petition filed in this case and the defendant's answer thereto; and
- (b) The documents and photographs accompanying the stipulation previously filed in this case and referred to therein as Exhibits "A," "B," "C," "D," "E," and "P."

Respectfully submitted,

RONALD A. JACKS

Ronald A. Jacks

Attorney for Plaintiffs

(Decided June 14, 1968)

THE NATIONAL BOARD OF THE YOUNG MEN'S
CHRISTIAN ASSOCIATIONS, THE SOJOURNER'S
LODGE, MASONIC TEMPLE, AND THE COM-
MERCE AND INDUSTRY INSURANCE COMPANY
v. THE UNITED STATES

Ronald A. Jacks, attorney of record, for plaintiffs.

Martin Green, with whom was *Assistant Attorney Gen-
eral Clyde O. Martz*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DUFEE, DAVIS,
COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAIN-
TIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

Plaintiffs¹ brought this action to recover just compensa-
tion under the fifth amendment for the destruction of and
damage to their properties in the Canal Zone during the
course of and shortly after the Panama riot of 1964. There
are two parts to plaintiffs' claim. The first and major por-
tion is for damages inflicted on plaintiffs' buildings by the
rioters after the buildings had been entered by United
States troops seeking cover from snipers' bullets. In the sec-
ond and lesser segment of the claim, plaintiffs seek recovery

¹ The Commerce and Industry Insurance Company, the insurer of the YMCA
property, joined in the action because it paid a portion of the loss under its
policy.

for losses alleged to have been caused after the cessation of the riot as a result of certain changes made in the Masonic Temple by the defendant for the purpose of fortifying it for use in any future riot. For the reasons hereinafter stated, we hold that plaintiffs are not entitled to recover.

The case is before us on cross-motions for summary judgment, and the basic facts have been stipulated.²

The buildings involved in this action are the YMCA building owned by the National Board of the Young Men's Christian Associations and the Masonic Temple owned by the Sojourner's Lodge of the Masonic Order. Both are situated on the Atlantic side of the Canal Zone in the City of Cristobal and are located next to each other just inside the Zone on Bolivar Avenue. At this location, 11th Street and Bolivar Avenue intersect and form a right angle boundary between the Canal Zone and the Republic of Panama. The Masonic Temple is located just inside the right angle, and it is bounded on the right by the YMCA which faces Bolivar Avenue and on the left by the Old Commissary Building which faces 11th Street.

On the evening of January 9, 1964, a group of 200 Panamanian students entered the Pacific side of the Zone in the vicinity of the Balboa High School and became embroiled in a dispute over the failure to fly the Panamanian flag alongside the United States flag at the school. The students left in anger without raising their flag and, as they did so, they began to damage property in the Zone.

As stated in the introduction of the United States Presentation to the Select Committee of the Organization of American States, the "students' fury became the spark for mass incursions into the Canal Zone by Panamanian rioters at

² The parties have agreed that the material facts are set forth in the official United States Presentation to the Select Committee of the Organization of American States established under the Resolution of February 6, 1964, to investigate charges of American aggression. Several other documentary exhibits are also covered by the stipulation.

numerous points along an extended border. The mobs attacked and killed U.S. and Panamanian citizens and burned and looted their properties. A maximum effort by the Canal Zone Police force was required to prevent the mobs from reaching U.S. residential areas. The number and force of mob attacks upon persons and property in the Zone exceeded the capacity of the police to contain them, and at 8 p.m. on January 9th, the Commander of the Armed Forces in the Canal Zone assumed responsibility for law and order in the Canal Zone." [Exhibit A at VI]

The rioting first reached major proportions on the Pacific side of the Zone and at 8:30 p.m. on January 9, 1964, General O'Meara, Commander of the Armed Forces in the Canal Zone, dispatched troops to the Pacific side with instructions to clear the area of rioters and to secure it against further unauthorized intrusions. Soon, thereafter, the military units began to clear the Pacific side, encountering moderate resistance.

Rioting in the Cristobal-Colon area on the Atlantic side of the Canal Zone, 50 miles away from the Pacific side, began at 8 p.m. on the night of January 9, 1964. By 9:15 p.m., a mob of 1,500 persons had formed and proceeded to the Panama Canal Administration Building, where they raised a Panamanian flag. Shortly thereafter, a contingent of the rioters broke into, looted, and destroyed the contents of the Panama Canal Company Office and Storage Building. They then broke windows in the Masonic Temple, and after entering the YMCA building, looted and wrecked its interior.

At 9:50 p.m. on the same evening, Colonel William Sachse, Commanding Officer of the 4th Battalion, was ordered to proceed with his troops to Cristobal with the objective of clearing the rioters from the Atlantic end of the Zone and sealing the border from further encroachment. When the battalion, consisting of the Panamanians retreated across Bolivar Avenue into the Republic of Panama. However, a battalion, consisting of about 700 men, arrived in the area,

a large group of the Panamanians retreated across Bolivar Avenue into the Republic of Panama. However, a number of rioters jumped from the second floor windows of the Masonic Temple and attacked the troops with lead pipes and sticks. After the Panamanians were ejected from the buildings, the troops linked up to seal off the Zone boundary. By that time, the troops were confronted with a mob of about 3,000 people, which began to assault them with a shower of rocks, bricks, plate glass, and Molotov cocktails.

Sniper fire began; one trooper was killed, two others were wounded by bullets, and many others were injured by the flying debris and Molotov cocktails. Although they were under continuous attack, the American troops were ordered not to return the fire lest innocent persons be injured in the crowded area. Therefore, only tear gas grenades were used to contain the mob and discourage the attacks. Finally, in order to protect his troops from sniper fire, the commanding officer moved them into the YMCA building, the Masonic Temple, and the adjoining Old Commissary Building shortly after midnight on January 9, 1964.

At 10 a.m. on January 10, 1964, the rioters launched a heavy attack of Molotov cocktails against the YMCA building, setting it afire. The Canal Zone firefighters, who attempted to control the blaze, were hampered by sniper fire and by 2 p.m., the troops were forced to evacuate the building and take up positions at the rear of the building in a parking lot which had been sandbagged during the night. The rioters then attacked the Masonic Temple with Molotov cocktails, and the command post which had been established in that building had to be abandoned. However, an observation post was maintained on the top floor of the structure, which was the highest building in the area. The YMCA continued to be a target for Molotov cocktails throughout the day and sniper activities continued at 12th Street and Bolivar Avenue. During the evening of January 10, the soldiers on the top floor of the Masonic Temple were under heavy sniper fire for 2½ hours. On January 11, the Old Commis-

sary Building was totally destroyed by fire started by the Molotov cocktails.

By 2:45 p.m. on January 11, 1964, three American soldiers had been killed and twelve had been wounded by sniper fire. When these casualties were reported, the commanding officer was granted permission to allow selected marksmen using shotguns to return fire on known snipers.

On January 12, heavy sniper fire and the use of Molotov cocktail were prevalent in the Masonic Temple area, and the second story of the Masonic Temple was set afire on the same morning. Sniper and fire bomb activity continued in the area until midnight of January 12, 1964, when the crowd dispersed.

On January 13, 1964, the Panamanian National Guard took effective control of the Colon side of the boundary and hostile action in the area thereafter ceased. At 8 a.m. on Thursday, January 16, 1964, General O'Meara relinquished control of the Canal Zone to the Governor of the Canal Zone.

The YMCA's auditorium-gymnasium was totally destroyed and the remainder of the building was badly damaged. After deducting an amount which they have allocated to damage done by the rioters before the Army entered the building, the YMCA and its insurer seek recovery of \$212,196 for the loss and damage to that building. Because of its predominantly concrete and brick construction, the Masonic Temple suffered considerably less damage. After again making an allowance for damage attributable to the rioters prior to Army occupancy, plaintiffs claim \$32,996.70 for property loss to the Masonic Temple.

In addition to the YMCA building and the Masonic Temple, private properties of churches, steamship agencies and lodges were damaged during the riot. Also, some 160-odd automobiles were damaged or destroyed.

Publicly owned property damaged or destroyed in Cristobal included the Panama Canal Office and Storage Building,

the Sanitation Office, many railroad ties, street lights, and traffic and railroad signals. A substantial portion of Government property used by the Inter-American Geodetic Survey was burned and looted. In addition, United States military personnel reported loss of household goods and possessions valued at \$72,000.

I

Against the foregoing factual background, our first task is to decide whether the destruction of the YMCA building and the damage to the Masonic Temple during their temporary occupancy by American troops occurred under such circumstances as to constitute a compensable taking. It is axiomatic that the fifth amendment is not suspended in war-time, but it is equally well recognized that a destruction of private property in battle or by enemy forces is not compensable. As this court declared long ago, "No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy * * *." *Perrin v. United States*, 4 Ct. Cl. 543, 547-48 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1870). See also *United States v. Pacific R.R.*, 120 U.S. 227 (1887).

The United States was not at war with the Republic of Panama at the time plaintiffs' buildings were occupied but Army troops were confronted with a large and hostile force under conditions presenting immediate danger to them, as well as to the lives and property of American citizens in the Canal Zone. In a report which both parties have agreed is a factual account of the rioting in the Cristobal-Colon area, it is stated:

* * * The second phase began with the arrival of the troops between 10:15 and 10:40 p.m., when the mob violence grew until it became a pitched battle between the rioting mob backed up by concealed snipers, on one side, and the U.S. Army troops on the other.³

³ Page 7 of fact sheet compiled by the Office of General Counsel of the Army in evidence as Exhibit B.

Consequently, we believe that the same principles of law are to be applied here as obtain in a case where the military forces of this country are engaged in combat with a public enemy.

Plaintiffs have expressly excluded from their claim the damage done the YMCA building and the Masonic Temple by the rioters before the buildings were occupied by American troops. However, they stand on the proposition that their buildings were appropriated for public use, and assert that during a war or at other times when private property is used by the Government, just compensation must be paid pursuant to the fifth amendment, except when such property is deliberately destroyed to keep it from falling into enemy hands. In support of their position, plaintiffs rely primarily on the dicta contained in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) and *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871). However, neither of these cases involved a situation where private property was destroyed while serving as a temporary refuge for our military forces during an actual confrontation with hostile enemy forces. In the *Harmony* case, the plaintiffs' property, which consisted of mules, wagons, and goods, was taken for the purpose of strengthening the Army for its expedition to Chihuahua, which was 300 miles distant at the time, and in the *Russell* case, Army officials requisitioned plaintiffs' steamboats to carry Government freight for a period of from 26 to 60 days. Neither *Harmony* nor *Russell* involved impending danger in the context of a hostile confrontation similar to that which we find in the instant litigation. Instead, the property in those cases was requisitioned in a manner much akin to the procurement of goods and services under contract—in the absence of immediate danger, after deliberation, and for a somewhat later and less temporary use.

Neither of the parties has cited nor have we found any court decision presenting a factual situation similar to that

now before us. In view of the broad language of the fifth amendment and the difficulty we find in determining whether compensation is required in this case, we look to the general principles announced in the decisional law to find the narrow and sometimes indistinct line that separate losses that are necessary incidents of the ravages and burdens of war from those situations where the Government is obliged to pay compensation to the owner of private property that is taken for public use.

In *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), which is the latest expression of the Supreme Court on the subject, compensation under the fifth amendment was denied to the owners of private property destroyed by the Army to prevent its imminent capture and use by an advancing enemy. The *Harmony* and *Russell* cases were distinguished on the ground that, in both, private property had been impressed by the Army for subsequent use by it. The Court quoted the following dictum of Mr. Justice Field in *United States v. Pacific R.R.*, *supra*, and declared that it is the law today:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. [344 U.S. at 153-54]

As we read the decision, we think the Supreme Court also approved the general principles set forth in the *Pacific Railroad* case and reaffirmed the doctrine of sovereign immunity for losses attributable to the fortunes of war or public necessity in times of imminent danger or peril. In the *Pacific Railroad* case, Mr. Justice Field noted the distinction between the immunity of the sovereign for the temporary

occupancy or destruction of private property as a necessary incident of military action urgently required to defend against an attacking enemy, and private property that is taken for later use by the Army. The Court there quoted with approval the following portion of the Veto Message of President Grant:

It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be *temporarily occupied*, or even actually destroyed, in time of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner [120 U.S. at 238 (emphasis added)]

In elaborating on the exemption of the Government from liability for the temporary occupancy of private property as a measure that is necessary for the safety and efficiency of troops during military operations, the court distinguished such uses of private property from a compensable taking occurring under conditions less than those of imminent peril, as where there is a voluntary requisitioning of steamboats to transport troops or munitions of war, or of buildings to house soldiers or to store war materiel (i.e., *Harmony and Russell*).

In *Franco-Italian Packing v. United States*, 130 Ct. Cl. 736, 128 F. Supp. 408 (1955), this court had occasion to re-examine *United States v. Pacific R.R.*, *supra*. As a result of that examination, the court, in an opinion written by Judge Laramore, declared:

The Supreme Court in *United States v. Pacific Railroad*, 120 U.S. 227, established the rule that the sovereign is immune from liability for confiscation of private property taken by defendant, through destruction or otherwise, to prevent it from falling into enemy hands, or to protect the health of troops, or as an incidental element of defense against hostile attack and is not compensable under the fifth amendment. [130 Ct. Cl. at 747, 128 F. Supp. at 414]

The above-quoted expression is admittedly dictum, but we think it announces a principle of law which should be applied in deciding the issues raised by the particular facts of this case.

As we have already noted, it is a thin line which the case law has at times drawn between sovereign immunity and governmental liability. The lack of more certain guidelines is unfortunate; however, we think it is at least clear that the decisions have rather consistently placed on the opposite sides of that line a temporary occupancy of private property which is immediately necessary for the safety of troops or to meet an emergency threatening great public danger and a voluntary appropriation of private property under conditions where there is no compulsive use or occupancy in the face of imminent danger. When the facts of this case are viewed in their entirety, it is our conclusion that they fall more nearly in the first category and, therefore, necessarily place the case on the sovereign immunity side of that fine judicial line.

In view of the unusual circumstances presented by the facts of the case, we think it is also appropriate to look for guidance to the relevant reports and expressions of the Congress, just as the Supreme Court did in *United States v. Pacific R.R.*, *supra*. In an elaborate report on claims growing out of the Civil War, the House of Representatives distinguished between the temporary use of property as an urgent military necessity from other takings for war purposes. The report reads in pertinent part as follows:

By the principles of universal law recognized anterior to the Constitution, in force when it was adopted, and never abrogated, every civilized nation is in duty bound to pay for army supplies taken from its loyal citizens, and for all property voluntarily taken for or devoted to "public use."

But there is a class of cases in which property, real or personal, of loyal citizens may be temporarily occupied or injured, or even destroyed, on the theater of and by military operations, either in a loyal State or in

enemy's country, in time of war, as a military necessity. The advance or retreat of an army may necessarily destroy roads, bridges, fences, and growing crops.

In self-defense an army may, of necessity, erect forts, construct embankments, and seize cotton bales, timber, or stone, to make barricades.

In battle or immediately after, and when it may be impossible to procure property in any regular mode by contract or impressment, self-preservation and humanity may require the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, and for necessary military operations which admit of neither choice nor delay.

In these and similar cases the question arises whether there is a deliberate voluntary taking of property for public use requiring compensation, or whether these acts arise from and are governed by the law of overruling military necessity—mere accidents of war inevitably and unavoidably incidental to its operations—and which by international law impose no obligation to make recompense. It seems quite clear that they are of this latter class.

The Government has always paid loyal citizens for the use and occupation of buildings and grounds in loyal States when used for officers' quarters, regular recruiting camps, and in cases where the occupation was voluntary and the result of choice, superinduced by no overruling military necessity, and for this the law provides.

But a temporary occupancy of real estate imposed by overruling necessity—an occupancy continued during the actual existence of such impending necessity—or the application of materials to purposes of defense in an emergency, has not, by the usage of the Government, been regarded as giving any claim for compensation. [H.R. Rep's No. 262, 43d Cong., 1st Sess., pages 39, 43.]

Mindful of the Supreme Court's caveat in *Calter* that each case in this category must be judged on its own facts, we refrain from laying down any broad or general rule. We

decide only that the temporary occupancy of plaintiffs' buildings and the damage inflicted on them by the rioters during such occupancy did not constitute a taking of the buildings for use by the Army within the contemplation of the fifth amendment, as that amendment is interpreted by the authorities discussed above. It is abundantly clear from the record before us that the military units dispatched to the Atlantic side of the Zone by General O'Meara were not sent there for the purpose or with the intention of requisitioning or taking plaintiffs' buildings to house soldiers. Both buildings had previously been looted and damaged by the rioters. Colonel Sachse's men were ordered to remove the Panamanians from the buildings in order to prevent further loss or destruction and then to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone. After the Army troops became engaged in a pitched battle with a large and formidable mob and then only after one soldier was killed and many others were injured by bullets and missiles, the troops were ordered into the buildings in order to avoid further casualties among them. During the temporary occupancy of the two buildings, they were under a sustained attack by the mob until the riot ended. Moreover, it is undisputed that all of the damages included in the main portion of plaintiffs' claim were inflicted by the rioters. Consequently, we hold that the loss is one which must fall upon the plaintiffs.

II

There remains for consideration that portion of plaintiffs' claim for loss of value and rental income arising out of alterations to the Masonic Temple, which the Government made after the cessation of the riot for the purpose of fortifying the building for use in any future riot. The alterations in the building were made to improve its security and to provide a reasonably safe place in which the Canal Zone police and the military could be stationed in the event of future disturbances in the area. Therefore, at Government expense, the windows and doors fronting 11th Street and Bolivar Avenue on the ground floor were sealed with con-

crete blocks and the wooden doors and windows on the other two sides were covered with sheet metal to make them fire resistant. Wire mesh was placed over all the windows on the second, third, and fourth floors, and steel shields were installed on the rooftop.

The only claim made regarding the changes is for the loss of value and rental income resulting from "sealing off the ground floor."

The plaintiffs contend that the alterations to the structure were forced upon them and that at no time did the officials of the Temple waive their right to claim a permanent loss as a result of the changes made by the Government. We find that this position is unsupported by the evidence, that the structural changes were made with the consent of the plaintiffs, and that a full accord and satisfaction was reached between the parties.

Plaintiffs correctly point out that on February 11, 1964, after the initial installations, the defendant by letter requested the Master of the Masonic Temple to confirm the fact that the changes in the building accorded with the prior verbal agreement of the parties. By reply of March 4, 1964, the master of the lodge replied that he had not specifically agreed to the complete blocking of the windows and doors on the ground floor and had understood that, in the future, the doors would be replaced and that some of the concrete window blocking would be replaced with glass brick. He ended the letter with the statement that he could not categorically agree that all the Government installations in the building were acceptable and that it might be necessary for the lodge to make a claim against the Government in the future. Had no further action been taken, plaintiffs might have a valid claim. The record is clear, however, that the parties subsequently agreed upon certain modifications in the installations which satisfied the lodge's request and conformed to its version of the verbal agreement. In reply to the March 4 letter, the Government, in a letter dated July 8, 1964, submitted to the master of the lodge a list of changes it was prepared to undertake, at Government expense, to

comply with the lodge's wishes. These changes included, *inter alia*, replacing some of the concrete blocks used to seal the doors and windows of the ground floor with doors and sections of glass brick, plus plastering and painting the remaining concrete blocks. The master of the lodge replied on August 6, 1964, in part, that "I am pleased to advise you that the work outlined by you to be completed at Government expense will be considered as *full compliance with our agreement.*" [Emphasis added.]

The evidence submitted with the motions of the parties consists of the correspondence between them, and it shows that the structural changes in the Temple were made with the consent of the owner. There is no indication that either party at any time considered the changes to be a "taking" within the meaning of the fifth amendment. It is clear that the only claim the Masonic Temple intended to reserve in its March 4, 1964, letter was one for specified unacceptable installations, and that those defects were later remedied to the full satisfaction of the owner. Moreover, plaintiffs have failed to support their claim with any evidence that the alterations decreased the value of the property or lowered its rental value. In the absence of such proof, we may assume that the structural changes were as much a benefit to the Masonic Temple as they were to the Government, inasmuch as such changes rendered the building less vulnerable to riot damage in the future.

III

Our conclusions stated above require the granting of defendant's motion for summary judgment, the denial of plaintiffs' motion for summary judgment, and the dismissal of plaintiffs' petition. It is so ordered.

• DAVIS, *Judge*, dissenting in part:

On the question decided in Part I. of the court's opinion,¹ this is an extremely close case, teetering on the balance. The

¹ I join in Part II of the opinion.

court's view is certainly tenable and may be correct, but I have come to another conclusion and therefore explain it briefly. My disagreement turns on a difference, primarily, as to the legal significance of an emergency situation or imminent hostilities, and secondarily, as to the conclusion to be drawn from the specific facts of this case.

In one of its briefs the Government says: "the plaintiffs assume to be a matter of fact the seizure and use of their buildings *as a place of refuge and defense for American troops* (Pl. Br. pp. 14, 31), and on the basis of this convenient assumption argue that the United States must compensate them for its use of their property. Were their assumption true, their argument based upon it would be correct." (Emphasis added.)² This statement reflects—together with its counterpart, quoted in note 2—the traditional rules as I understand them. Where private property has been destroyed or damaged as a result of armed conflict, the sovereign is not liable (i) if the damage was deliberately done to prevent its falling into enemy hands (denial destruction),³ or (ii) if the damage occurred (as variously put) in actual battle, by "the fortunes of war", "in the path of war", "by actual and necessary military operations", through bombardment or shelling, or in attacking or defending against the enemy.⁴ On the other hand, the Government is liable where it first takes the property for its own military

² The brief goes on: "However, the stipulated facts, which we shall review subsequently, clearly show that the plaintiffs' buildings were not appropriated by the Army for a public use, but were merely entered by the Army as an incident of its task of ejecting looters and rioters and restoring order in the Canal Zone" (emphasis added).

³ *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952).

⁴ See *United States v. Pacific R.R.*, 120 U.S. 227, 234-35, 238-39 (1887); *United States v. Caltex (Philippines), Inc.*, *supra*, 344 U.S. at 153-54, 155-56; *Perrin v. United States*, 4 Ct. Cl. 543, 547-48 (1868), *aff'd*, 12 Wall. 315 (1870); *Franco-Italian Packing Co. v. United States*, 130 Ct. Cl. 736, 747, 128 F. Supp. 408, 414-15 (1955); II Whiteman, *Damages in International Law* 1421 (1937).

use, and then exposes the place to enemy attack or evokes one, leading to injury or destruction.⁵ In this connection, there is no exception from liability, as I read the materials, for temporary seizures for military use in the fact of imminent hostility or to meet an emergency; once the property is taken for a military use, the Government is responsible for its subsequent injury, no matter how quickly that follows upon the seizure.⁶ The boundary between these latter "takings" and the "fortunes of war" cases is indeed thin, indistinct, and hard to trace. But these are our current guidelines, unsatisfactory though they be, and I do not see

⁵ See *Mitchell v. Harmony*, 13 How. 115, 133-34 (1852); *United States v. Russell*, 13 Wall. 623, 627-28 (1871); *United States v. Pacific R.R.*, *supra*, 120 U.S. at 234, 239; *Walker v. United States*, 34 Ct. Cl. 345, 347 (1899); Borchard, *Diplomatic Protection of Citizens Abroad* 262-64 (1915); II Whiteman, *op. cit.*, *supra*, at 1421; *Putegnati's Heirs* (U.S. v. Mexico), IV Moore, *International Arbitration*, 3718-3729 (1898); *American Elec. & Mfg. Co.* (United States v. Venezuela), Ralston's Report, 128 (1904) *Annuziata Petrocelli* (Italy v. Venezuela), Ralston's Report 762, 763 (1904).

⁶ See II Whiteman, *op. cit.*, *supra*, at 1421 ("Where, however, real property is used, occupied, etc. so as to expose that property particularly to enemy fire, compensation is made for such use on the ground that the property has been seized for public use and destroyed as so employed."); *Putegnati's Heirs*, *supra* (house seized and fortified, then destroyed by enemy forces); *American Elec. & Mfg. Co.*, *supra* (telephone plant damaged, after Government troops seized it during an attack); *Annuziata Petrocelli*, *supra* (government troops entrenched themselves in front of claimant's house and took possession of it, leading to an enemy attack).

The House Report (H.R. Rep. No. 262, 43d Cong., 1st Sess.) on which the majority relies does say that compensation need not be paid for "the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, or for necessary military operations which admit of neither choice or delay", but I do not think that, in this respect, the congressional report states the rule correctly. The authorities cited in footnote 5 and in the first paragraph of this footnote—particularly the actual decisions of international arbitral tribunals—are to the contrary. I do not understand the dictum in *Franco-Italian Packing Co. v. United States*, *supra*, 130 Ct. Cl. at 747, 128 F. Supp. at 414 (noncompensability of property seized "as an incidental element of defense against hostile attack") as covering a seizure of property for military use, and the subsequent destruction of that property, but merely destruction or injury by the Government's troops in the course of a battle.

it as the function of this court, at this time, to alter them or build anew. We must apply them as best we can.⁷

To use the words of defendant's brief, was the Government's temporary occupation of plaintiffs' building "as a place of refuge and defense for American troops" or was it "as an incident of its task of ejecting looters and rioters and restoring order in the Canal Zone"?⁸ The former would be a compensable taking for military use even though destruction followed shortly; the latter a noncompensable incident of battle. As I appraise this record, the first is the better characterization of the facts. The United States troops cleared plaintiffs' holdings of rioters and looters before the occupation of the buildings, and took up stations in the street in front of the buildings; the soldiers remained there for a while and did not withdraw into the buildings until after sniper fire had begun, and this withdrawal was made to "protect the troops from the sniper fire and early sieges of Molotov cocktails";⁹ inside the buildings the soldiers erected barricades and took shelter, not only from the sniper fire but from the Molotov cocktail attacks which followed; also, a "command post" on the top floor of that structure; the soldiers remained in the YMCA and the ground floor of the Masonic Temple for some 12 to 14 hours, and longer on the top of the Masonic Temple.

To me, all of this shows the seizure and use of both buildings "as a place of refuge and defense for American troops"—a place of protection, of shelter, of rest, of a com-

⁷ Nor does the majority of the court attempt to refashion the governing rules, at it sees them.

⁸ I judge from its briefs that the defendant's position on the legal irrelevance of an emergency situation or imminent hostilities—if a "taking" in fact occurs—is closer to mine than to the court's.

⁹ The United States' official presentation before the OAS said that the platoons were moved to the buildings "to provide more protection from the sniper fire"; the General Counsel of the Army said that the purpose of the withdrawal was "in order to protect the troops from the sniper fire"; the commanding officer of the U.S. Forces in Cristobal described the maneuver as providing "cover" for the troops from sniper fire.

mand post, and of an observation point. The assaults from the Panamanian side on the buildings (for which plaintiffs now seek recovery) came about because; and after, the United States troops had entered and occupied them. The buildings were "used, occupied, etc. so as to expose that property particularly to enemy fire" (II Whiteman, *op. cit. supra*, at 1421). The buildings' "destruction by the enemy * * * [was] a necessary consequence of the nature of the service to which, for the public benefit, the * * * [buildings] were subjected"; "the enemy destroyed the property indeed, but only after the Government had taken it for public use, by being used by the Government, and because it was so used" (*Putegnati's Heirs, supra*). "When the Government's troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction" (*Annuziata Petrocelli, supra*, at 763).

Conversely, these facts show, to my mind, that the injury to plaintiffs' property did not occur directly "as an incident of [the troops'] task of ejecting looters and rioters and restoring order in the Canal Zone" (as defendant puts it), or because the buildings were shelled or burnt in the course of a running battle in the area (as were other structures in the Zone), or as "mere accidents of war inevitably and unavoidably incidental to its operations" (H.R. Rep. No. 262, *supra*).¹⁰

For these reasons, I would hold for the plaintiffs on this branch of their claim.

¹⁰ For instance, the damage to the structures occurring before the rioters were evicted by the troops or in the course of evicting them (losses for which plaintiffs do not ask recovery) is non-compensable. Similarly, no damages would be payable if the later injury to the buildings were caused by efforts of soldiers stationed on the street to put out fires, or to prevent the storming of the buildings, or to stop renewed entry by rioters into the buildings.

Exhibit E

This Exhibit consists of 33 photographs of the YMCA, Masonic Temple and Commisary [sic] Building, located in Cristobal, Canal Zone, and relates to the events which occurred during the period from January 9, 1964 through January 14, 1964. With the exception of E-32 and E-33, all of the photographs were taken during the period from January 10, 1964 through January 15, 1964. Photographs E-1 through E-28 were taken by Rev. Daniel B. Meritt of the Margarita Union Church, Margarita, Canal Zone, and Rev. Clarence C. Payne, Balboa, Canal Zone. The photographs E-29 through E-33 were taken by U.S. Government photographers:

E 1-2: Photographs taken on Friday, January 10, showing U.S. Army troops inside main building of YMCA.

E 3: Photograph taken January 10, showing U.S. troops inside YMCA Annex which was later completely destroyed.

E 4: Photograph taken on the morning of Friday, January 10, showing interior of main building of the YMCA.

E 5: Photograph taken about 9:00 a.m., Friday, January 10, showing back entrance to the Masonic Temple located on Balboa Avenue. (See Chart—Exhibit P-M4).

E 6: Photograph taken about 9:00 a.m., Friday, January 10, showing barber shop in YMCA.

E 7: Photograph taken about 11:00 a.m. on Friday, January 10, showing mob crowding on the Republic of Panama side of Bolivar Avenue, just opposite the YMCA.

E 8: Photograph taken about 1:00 p.m., Friday, January 10, showing initial stages of the destruction of the YMCA by fire.

E 9: Photograph taken about 3:00 p.m., Sunday, January 12, looking northwest over Commisary [sic] Build-

ing and Masonic Temple, showing ruins of Commisary [sic] Building.

E 10: Photograph taken about 3:00 p.m., Sunday, January 12, showing ruins of YMCA and Masonic Temple.

E 11-13: Photographs taken about 3:00 p.m., Sunday, January 12, showing remains of YMCA Annex.

E 14-16: Photographs taken about 3:00 p.m., Sunday, January 12, showing Masonic Temple and troop positions behind YMCA.

E 17-20: Photographs taken Tuesday, January 14, showing remains of interior of the YMCA Annex.

E 21-24: Photographs taken Tuesday, January 14, showing damage within main building of the YMCA.

E 25-26: Photographs taken Tuesday, January 14, showing barricade between YMCA and Masonic Temple and barricade between Masonic Temple and Commisary [sic] Building.

E 27: Photograph taken Tuesday, January 14, showing remains of Commisary [sic] Building.

E 28: Photograph taken Tuesday, January 14, showing case of Molotov cocktails found inside YMCA Annex after its destruction by fire.

E 29: Photograph taken on or about January 14, looking southwest on 11th Street, showing outside destruction of Masonic Temple.

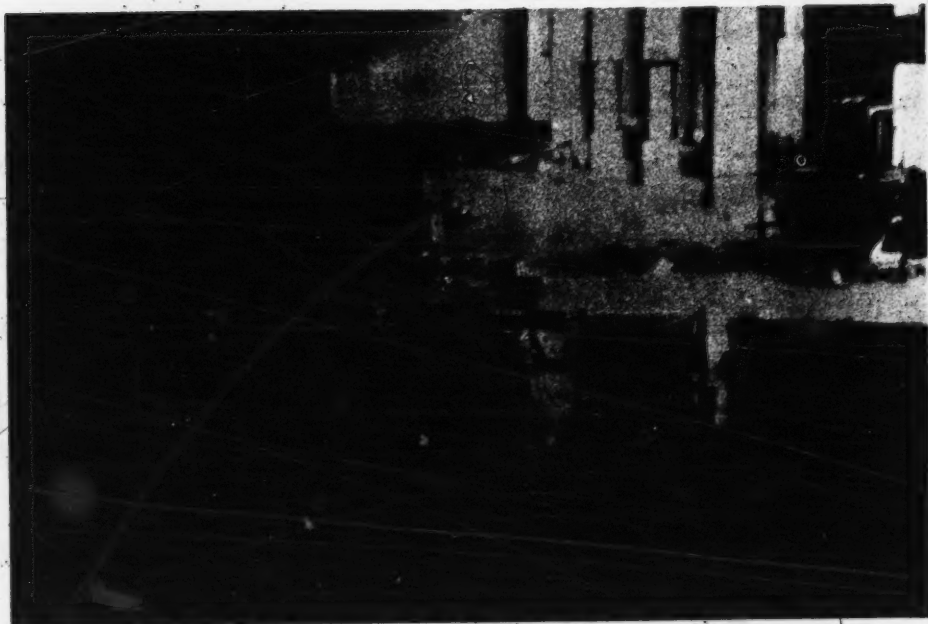
E 30-31: Photographs taken on or about Tuesday, January 14, looking southeast on Bolivar Avenue, showing outside destruction of Masonic Temple and YMCA.

E 32: Photograph taken sometime after January 14, showing Masonic Temple, subsequent to repairs by the U.S. Government's Panama Canal Company.

E 33: Photograph taken on November 16, 1966, showing Masonic Temple after final repairs by U.S. Government.



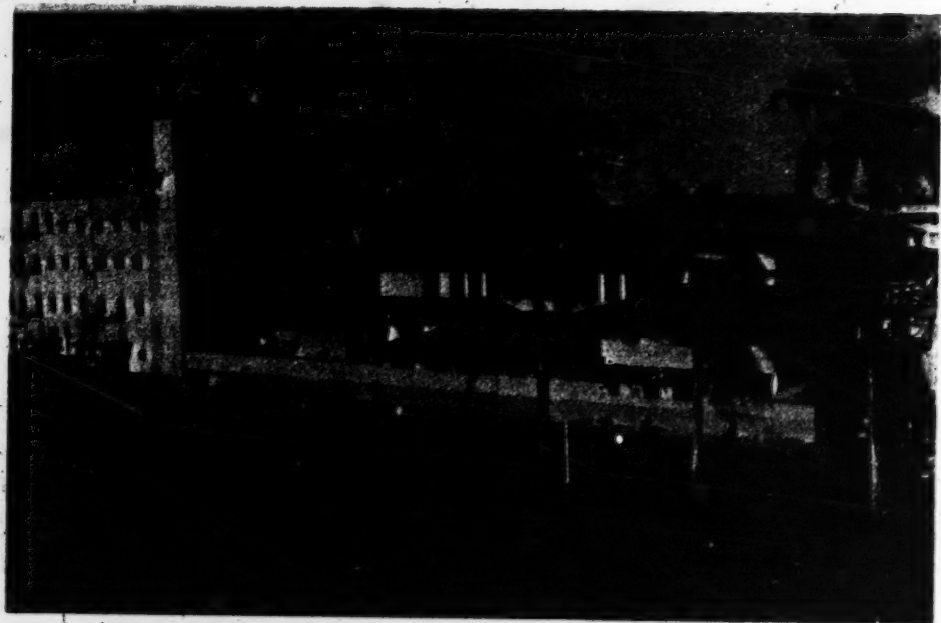
E-1.



E-2.



E-9.





MAP EXHIBIT - CRISTOBAL

300 FEET

COLON HARBOR

CANAL ZONE BOUNDARY

CRISTOBAL PIER AREA

ADMINISTRATIVE BUILDING

CANAL

CRISTOBAL HARBOR

ZONE

RAILROAD

REPUBLIC

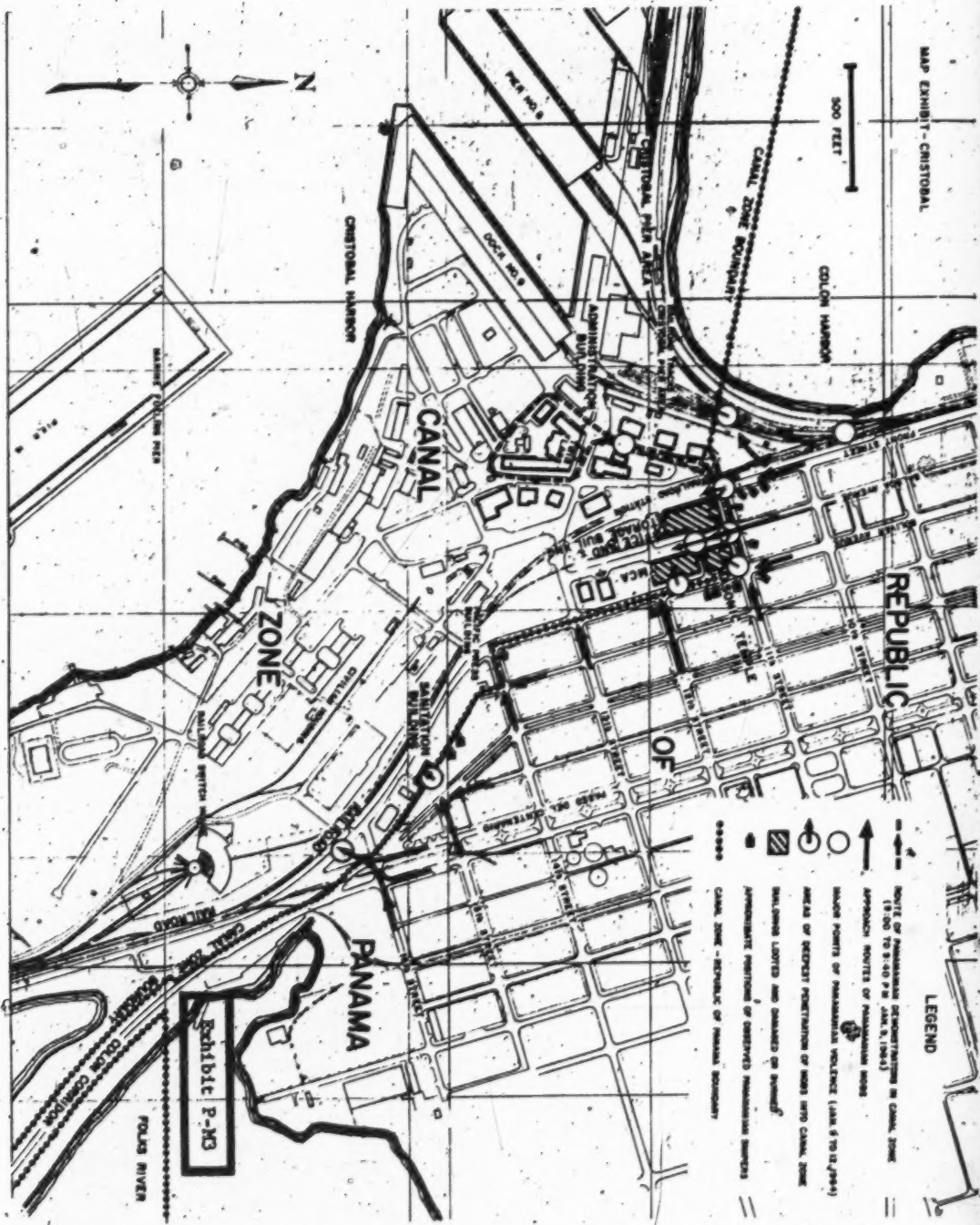
OF

PANAMA

Exhibit P-13

LEGEND

- ROUTE OF PANAMA TRANSPORTATION IN CANAL ZONE (1900 TO 3:40 PM JAN 8, 1901)
- APPROACH ROUTE OF PANAMA ZONE
- MAJOR PORTS OF PANAMA ZONE (JAN 8 TO 12, 1901)
- AREAS OF DEEPER PENETRATION OF WARS INTO CANAL ZONE
- RAILROAD LINES AND BRANCHES OF CANAL ZONE
- APPROXIMATE POSITIONS OF DEEPER PANAMA ZONE
- CANAL ZONE - REPUBLIC OF PANAMA BOUNDARY



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CARD

5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. **517**

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN
ASSOCIATIONS, ET AL., *Petitioners* "

v.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No.

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN
ASSOCIATIONS, ET AL., *Petitioners*

v.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

The National Board of the Young Men's Christian Association and other petitioners herein pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in the above-captioned case on June 14, 1968.

OPINIONS BELOW

The opinion of the Court of Claims (App. *infra* pp. 1a-19a) is reported at 396 F. 2d 467.

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the United States' obligation to pay just compensation under the Fifth Amendment is suspended during peacetime confrontations between U.S. military forces and private citizens.

2. Whether *United States v. Caltex* ought to be overruled.

STATEMENT

This is a claim for just compensation under the Fifth Amendment to the United States Constitution arising out of the U.S. Army's seizure and use of petitioners' real property during the Panamanian riots of 1964. The basic facts are not in dispute.¹ Petitioners² own and occupy buildings located on the Atlantic side of the isthmus just inside the zone on the street which forms the boundary line at that point with the Republic of Panama. On the evening of January 9, 1964, U.S. Army troops cleared the area of rioters and took up positions in front of petitioners' buildings. After receiving sniper fire from the Pana-

¹ The parties stipulated below that the official U.S. oral and written presentations before the Organization of American States concerning the events in question, constitute an accurate recital of the pivotal facts. These statements were further amplified in a letter from the General Counsel of the Army to petitioners' counsel which was included in the stipulation.

² The YMCA and Masonic Temple are joined by the YMCA's property insurer, the Commerce and Industrial Insurance Company, which paid a portion of the total loss.

manian side of the border, the troops withdrew into petitioners' buildings to "protect" themselves from further assault and establish necessary defensive positions. (App. pp. 4a, 18a-19a).

The rioters responded with a series of Molotov cocktail attacks against the YMCA where the bulk of the troops were located. The mob finally succeeded in setting the YMCA on fire on the afternoon of January 10, and the troops were forced to withdraw. (App. p. 4a) The rioters then turned to the Masonic Temple but were unable to set the building on fire because of a difference in construction. Consequently the Army was able to maintain an observation post on top of the Masonic Temple throughout the period from January 9 through the cessation of disturbances on January 12, 1964. (*Id.*) During this time, U.S. forces were under strict orders not to fire upon the rioters under any circumstances until the afternoon of January 11, when certain trained marksmen were allowed to return selected fire against known snipers only.

Following the riots, the Army inspected the petitioners' buildings and ordered them altered to provide further fortification in the event of future riots.

Petitioners filed administrative claims with the Department of Army under 10 U.S.C. § 2733 which were duly denied whereupon they filed the instant action in the Court of Claims seeking just compensation under the Fifth Amendment. The Government entered a general denial, and the matter was submitted to the court on cross-motions for summary judgment, based on stipulated facts.

The Court of Claims, Judge Davis dissenting in part, held that the Government was not obligated under the

Fifth Amendment to pay just compensation for property which was "temporarily" taken and used by U.S. military forces in the presence of an "immediate danger"—even if that danger occurred in time of peace, not war. The majority also rejected petitioners' claim for damages arising out of the subsequent alteration of their property, finding that they had consented to the taking.

Judge Davis dissented from the first holding on the ground that "there is no exception from liability for temporary seizures for military use in the face of imminent hostility or to meet an emergency; once the property is taken for a military use, the Government is responsible for its subsequent injury, no matter how quickly that follows the seizure." (App. pp. 16a-17a).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for two reasons: First, the decision below represents a far-reaching extension of the questionable, but limited, exception to the Fifth Amendment established in *U.S. v. Caltex*, 344 U.S. 149 (1952). Second, the instant case demonstrates that it is time to review *Caltex* itself, to determine whether its holding and rationale have any relevance to the problems and demands of today's world.

1. In *United States v. Caltex*, this Court held, Justices Douglas and Black dissenting, that the U.S. was not obligated under the Fifth Amendment to pay compensation for Philippine oil storage facilities deliberately blown up by U.S. forces to prevent them from falling into the hands of invading Japanese armies. The rationale was that the Government ought to be able

to freely destroy strategic property without regard to ultimate liability when faced with immediate danger of seizure by enemy forces. The majority was quite careful to limit its holding to the situation where property was seized and deliberately destroyed; as opposed to the situation, as here, where property is seized and used but not deliberately destroyed by U.S. forces.³

The basis for this somewhat illogical distinction was the divergence of prior caselaw in which this Court found liability under the Fifth Amendment for seizure and use in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) and *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) but denied claims for losses resulting from seizure and deliberate destruction in *United States v. Pacific Railroad*, 120 U.S. 227 (1887).

The decision below extends the *Caltex* holding in two fundamental ways. First it applies the criterion of "immediate danger" to a peacetime confrontation between U.S. military forces and groups of citizens. Second, it no longer limits the military's tolerable ac-

³ In *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), Justice Harlan characterized the holding in *Caltex* as follows:

Except in the extraordinary situation where private property is destroyed by American armed forces to meet the exigencies of the military situation in a theatre of war, see *United States v. Caltex, Inc.*, 344 U.S. 149, 97 L.ed. 157, 73 S.Ct. 200, no case in this Court has held that the Government is excused from providing compensation when property has been 'taken' from its owners during wartime in the interest of the common good. (Emphasis added)

The majority in *Eureka* found that there had not been a taking because, *inter alia*, "it is clear from the record that the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." 357 U.S. at 165-66.

tions to deliberate destructions or "denial takings," but rather extends the cloak of immunity to any seizure and use of real or personal property by U.S. forces so long as they are confronted with an "immediate danger."

The first extension is beyond any suggestion or working premise of the majority in *Caltex*. From the very beginning the question of governmental liability for actions of military forces has been raised only in the context of open armed hostilities involving organized powers on both sides.⁴ To date no other court or writer has suggested that the traditional rules somehow apply in peacetime domestic riots. The second extension is squarely contrary to the *Caltex* majority's clear distinction between seizure and use on one hand and seizure and deliberate destruction on the other, coupled with its unmistakable intent to limit its holding to the latter.

The necessary effect of these rulings is that the Government is now virtually immune from liability under the Fifth Amendment for the actions of U.S. forces in any past, present or future riot involving intense confrontations between federal troops and aroused citizens. So long as an "immediate danger" is present, the troops can, under the present holding, seize and use property on a "temporary" basis without incurring liability for any loss which might occur during that

⁴ See III Whiteman, *op. cit. supra* at p. 1734; Vattel, *Law of Nations*, Bk III, c. XV, § 232 (1760). See also Wolff, *The Science Method of War*, § 830, the *Classics of International Law* No. 13, Vol. II (1934 ed.); Borchard, *Diplomatic Protection of Citizens Abroad* (1915) pp. 262-264, and Wormser, *Collection of International War Damage Claims* (1944) p. 157.

See also authorities cited in footnote 5 of Judge Davis' dissenting opinion below (App. p. 16a).

use. Such a "danger" will be inevitably present or potentially present whenever the situation reaches the point where federal troops must be called in.

By any standards this is an extraordinary result. We believe it is visably at odds with the basic philosophy of the Fifth Amendment discussed below. At the very minimum, it presents a real and substantial need for determining whether such a conflict exists; a need that is underscored by the urgency and increasing frequency of the confrontations in which the issue arises. Resolution of this vital issue ought not to be left to a lower court—the only court likely to consider the question in view of the Court of Claims jurisdiction over Fifth Amendment claims in excess of \$10,000. This issue ought to be resolved by this Court and resolved now.

2. An equally basic reason for review is the *Caltex* decision itself. In our view it is manifestly wrong and ought to be reversed. Its underlying assumption that the Government must be able to seize and destroy property in time of war without regard to the niceties of compensation at a later date is essentially foreign to the basic concept of the Fifth Amendment and its guarantee of the use and enjoyment of private property. The proper philosophy was expressed by Justice Douglas dissenting in *Caltex* with Justice Black [344 U.S. at 156]:

I have no doubt that the military had authority to select this particular property for destruction. But whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was

deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprives the enemy of a valuable logistic weapon.

It seems to me that the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

We believe that the "guiding principle" enunciated by Justice Douglas is and should be the guiding principle today. Its essential forthrightness and soundness are as valid today as they were in 1952 or at the time of the adoption of the Fifth Amendment.

The decision below rejects that principle in favor of a somewhat limited view of the Government's responsibility. It correctly asserts that the Government has a duty to protect the public in general and that this duty includes the seizure and use of private property when necessary. But this is not and never has been the true issue. Rather the question is who pays for losses arising out of or occurring during that seizure and public use.

One alternative, that chosen by the court below, is to place the burden on those least equipped by location and fortune to bear the loss. The other, as expressed by Justices Douglas and Black in *Caltex* and Judge Davis below, is to distribute the cost to the public as a whole where the property is seized and actively utilized for the common good. This case affords a signal and significant opportunity for rejecting the former and strengthening the latter.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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September 1968

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 344-66

(Decided June 14, 1968)

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN ASSOCIATIONS, THE SOJOURNER'S LODGE, MASONIC TEMPLE, AND THE COMMERCE AND INDUSTRY INSURANCE COMPANY

v.

THE UNITED STATES

Ronald A. Jacks, attorney of record, for plaintiffs.

Martin Green, with whom was *Assistant Attorney General Clyde O. Martz*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

Plaintiffs¹ brought this action to recover just compensation under the fifth amendment for the destruction of and damage to their properties in the Canal Zone during the course of and shortly after the Panama riot of 1964. There are two parts to plaintiffs' claim. The first and major portion is for damages inflicted on plaintiffs' buildings by the rioters after the buildings had been entered by United States troops seeking cover from snipers' bullets. In the second and lesser segment of the claim, plaintiffs seek recovery for losses alleged to have been caused after the cessation of the riot as a result of certain changes made in

¹ The Commerce and Industry Insurance Company, the insurer of the YMCA property, joined in the action because it paid a portion of the loss under its policy.

the Masonic Temple by the defendant for the purpose of fortifying it for use in any future riot. For the reasons hereinafter stated, we hold that plaintiffs are not entitled to recover.

The case is before us on cross-motions for summary judgment, and the basic facts have been stipulated.²

The buildings involved in this action are the YMCA building owned by the National Board of the Young Men's Christian Associations and the Masonic Temple owned by the Sojourner's Lodge of the Masonic Order. Both are situated on the Atlantic side of the Canal Zone in the City of Cristobal and are located next to each other just inside the Zone on Bolivar Avenue. At this location, 11th Street and Bolivar Avenue intersect and form a right angle boundary between the Canal Zone and the Republic of Panama. The Masonic Temple is located just inside the right angle, and it is bounded on the right by the YMCA which faces Bolivar Avenue and on the left by the Old Commissary Building which faces 11th Street.

On the evening of January 9, 1964, a group of 200 Panamanian students entered the Pacific side of the Zone in the vicinity of the Balboa High School and became embroiled in a dispute over the failure to fly the Panamanian flag alongside the United States flag at the school. The students left in anger without raising their flag and, as they did so, they began to damage property in the Zone.

As stated in the introduction of the United States Presentation to the Select Committee of the Organization of American States, the "students' fury became the spark for

² The parties have agreed that the material facts are set forth in the official United States Presentation to the Select Committee of the Organization of American States established under the Resolution of February 6, 1964, to investigate charges of American aggression. Several other documentary exhibits are also covered by the stipulation.

mass incursions into the Canal Zone by Panamanian rioters at numerous points along an extended border. The mobs attacked and killed U.S. and Panamanian citizens and burned and looted their properties. A maximum effort by the Canal Zone Police force was required to prevent the mobs from reaching U.S. residential areas. The number and force of mob attacks upon persons and property in the Zone exceeded the capacity of the police to contain them, and at 8 p.m. on January 9th, the Commander of the Armed Forces in the Canal Zone assumed responsibility for law and order in the Canal Zone." [Exhibit A at VI]

The rioting first reached major proportions on the Pacific side of the Zone and at 8:30 p.m. on January 9, 1964, General O'Meara, Commander of the Armed Forces in the Canal Zone, dispatched troops to the Pacific side with instructions to clear the area of rioters and to secure it against further unauthorized intrusions. Soon, thereafter, the military units began to clear the Pacific side, encountering moderate resistance.

Rioting in the Cristobal-Colon area on the Atlantic side of the Canal Zone, 50 miles away from the Pacific side, began at 8 p.m. on the night of January 9, 1964. By 9:15 p.m., a mob of 1,500 persons had formed and proceeded to the Panama Canal Administration Building, where they raised a Panamanian flag. Shortly thereafter, a contingent of the rioters broke into, looted, and destroyed the contents of the Panama Canal Company Office and Storage Building. They then broke windows in the Masonic Temple, and after entering the YMCA building, looted and wrecked its interior.

At 9:50 p.m. on the same evening, Colonel William Sachse, Commanding Office of the 4th Battalion, was ordered to proceed with his troops to Cristobal with the objective of clearing the rioters from the Atlantic end of the Zone and sealing the border from further encroachment. When the battalion, consisting of about 700 men, arrived in the area, a large group of the Panamanians retreated

across Bolivar Avenue into the Republic of Panama. However, a number of rioters jumped from the second floor windows of the Masonic Temple and attacked the troops with lead pipes and sticks. After the Panamanians were ejected from the buildings, the troops linked up to seal off the Zone boundary. By that time, the troops were confronted with a mob of about 3,000 people, which began to assault them with a shower of rocks, bricks, plate glass, and Molotov cocktails.

Sniper fire began; one trooper was killed, two others were wounded by bullets, and many others were injured by the flying debris and Molotov cocktails. Although they were under continuous attack, the American troops were ordered not to return the fire lest innocent persons be injured in the crowded area. Therefore, only tear gas grenades were used to contain the mob and discourage the attacks. Finally, in order to protect his troops from sniper fire, the commanding officer moved them into the YMCA building, the Masonic Temple, and the adjoining Old Commissary Building shortly after midnight on January 9, 1964.

At 10 a.m. on January 10, 1964, the rioters launched a heavy attack of Molotov cocktails against the YMCA building, setting it afire. The Canal Zone firefighters, who attempted to control the blaze, were hampered by sniper fire and by 2 p.m., the troops were forced to evacuate the building and take up positions at the rear of the building in a parking lot which had been sandbagged during the night. The rioters then attacked the Masonic Temple with Molotov cocktails, and the command post which had been established in that building had to be abandoned. However, an observation post was maintained on the top floor of the structure, which was the highest building in the area. The YMCA continued to be a target for Molotov cocktails throughout the day and sniper activities continued at 12th Street and Bolivar Avenue. During the evening of January 10, the soldiers on the top floor of the Masonic Temple were under

heavy sniper fire for 2½ hours. On January 11, the Old Commissary Building was totally destroyed by fire started by the Molotov cocktails.

By 2:45 p.m. on January 11, 1964, three American soldiers had been killed and twelve had been wounded by sniper fire. When these casualties were reported, the commanding officer was granted permission to allow selected marksmen using shotguns to return fire on known snipers.

On January 12, heavy sniper fire and the use of Molotov cocktails were prevalent in the Masonic Temple area, and the second story of the Masonic Temple was set afire on the same morning. Sniper and fire bomb activities continued in the area until midnight of January 12, 1964, when the crowd dispersed.

On January 13, 1964, the Panamanian National Guard took effective control of the Colon side of the boundary and hostile action in the area thereafter ceased. At 8 a.m. on Thursday, January 16, 1964, General O'Meara relinquished control of the Canal Zone to the Governor of the Canal Zone.

The YMCA's auditorium-gymnasium was totally destroyed and the remainder of the building was badly damaged. After deducting an amount which they have allocated to damage done by the rioters before the Army entered the building, the YCMA and its insurer seek recovery of \$212,196 for the loss and damage to that building. Because of its predominantly concrete and brick construction, the Masonic Temple suffered considerably less damage. After again making an allowance for damage attributable to the rioters prior to Army occupancy, plaintiffs claim \$32,996.70 for property loss to the Masonic Temple.

In addition to the YMCA building and the Masonic Temple, private properties of churches, steamship agencies and lodges were damaged during the riot. Also, some 160-odd automobiles were damaged or destroyed.

Publicly owned property damaged or destroyed in Cristobal included the Panama Canal Office and Storage Building, the Sanitation Office, many railroad ties, street lights, and traffic and railroad signals. A substantial portion of Government property used by the Inter-American Geodetic Survey was burned and looted. In addition, United States military personnel reported loss of household goods and possessions valued at \$72,000.

I

Against the foregoing factual background, our first task is to decide whether the destruction of the YMCA building and the damage to the Masonic Temple during their temporary occupancy by American troops occurred under such circumstances as to constitute a compensable taking. It is axiomatic that the fifth amendment is not suspended in wartime, but it is equally well recognized that a destruction of private property in battle or by enemy forces is not compensable. As this court declared long ago, "No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy * * *." *Perrin v. United States*, 4 Ct. Cl. 543, 547-48 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1870). See also *United States v. Pacific R.R.*, 120 U.S. 227 (1887).

The United States was not at war with the Republic of Panama at the time plaintiffs' buildings were occupied but Army troops were confronted with a large and hostile force under conditions presenting immediate danger to them, as well as to the lives and property of American citizens in the Canal Zone. In a report which both parties have agreed is a factual account of the rioting in the Cristobal-Colon area, it is stated:

* * * The second phase began with the arrival of the troops between 10:15 and 10:40 p.m., when the mob violence grew until it became a pitched battle between

the rioting mob backed up by concealed snipers, on one side, and the U.S. Army troops on the other.³

Consequently, we believe that the same principles of law are to be applied here as obtain in a case where the military forces of this country are engaged in combat with a public enemy.

Plaintiffs have expressly excluded from their claim the damage done the YMCA building and the Masonic Temple by the rioters before the buildings were occupied by American troops. However, they stand on the proposition that their buildings were appropriated for public use, and assert that during a war or at other times when private property is used by the Government, just compensation must be paid pursuant to the fifth amendment, except when such property is deliberately destroyed to keep it from falling into enemy hands. In support of their position, plaintiffs rely primarily on the dicta contained in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) and *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871). However, neither of these cases involved a situation where private property was destroyed while serving as a temporary refuge for our military forces during an actual confrontation with hostile enemy forces. In the *Harmony* case, the plaintiffs' property, which consisted of mules, wagons, and goods, was taken for the purpose of strengthening the Army for its expedition to Chihuahua, which was 300 miles distant at the time, and in the *Russell* case, Army officials requisitioned plaintiffs' steamboats to carry Government freight for a period of from 26 to 60 days. Neither *Harmony* nor *Russell* involved impending danger in the context of a hostile confrontation similar to that which we find in the instant litigation. Instead, the property in those cases was requisitioned in a manner much akin to the procurement of goods and services under con-

³ Page 7 of fact sheet compiled by the Office of General Counsel of the Army in evidence as Exhibit B.

tract—in the absence of immediate danger, after deliberation, and for a somewhat later and less temporary use.

Neither of the parties has cited nor have we found any court decision presenting a factual situation similar to that now before us. In view of the broad language of the fifth amendment and the difficulty we find in determining whether compensation is required in this case, we look to the general principles announced in the decisional law to find the narrow and sometimes indistinct line that separates losses that are necessary incidents of the ravages and burdens of war from those situations where the Government is obliged to pay compensation to the owner of private property that is taken for public use.

In *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), which is the latest expression of the Supreme Court on the subject, compensation under the fifth amendment was denied to the owners of private property destroyed by the Army to prevent its imminent capture and use by an advancing enemy. The *Harmony* and *Russell* cases were distinguished on the ground that, in both, private property had been impressed by the Army for subsequent use by it. The Court quoted the following dictum of Mr. Justice Field in *United States v. Pacific R.R.*, *supra*, and declared that it is the law today:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. [344 U.S. at 153-54]

As we read the decision, we think the Supreme Court also approved the general principles set forth in the *Pacific Railroad* case and reaffirmed the doctrine of sovereign immunity for losses attributable to the fortunes of war or public necessity in times of imminent danger or peril. In the *Pacific Railroad* case, Mr. Justice Field noted the distinction between the immunity of the sovereign for the temporary occupancy or destruction of private property as a necessary incident of military action urgently required to defend against an attacking enemy, and private property that is taken for later use by the Army. The Court there quoted with approval the following portion of the Veto Message of President Grant:

It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be *temporarily occupied*, or even actually destroyed, in time of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. [120 U.S. at 238 (emphasis added)]

In elaborating on the exemption of the Government from liability for the temporary occupancy of private property as a measure that is necessary for the safety and efficiency of troops during military operations, the court distinguished such uses of private property from a compensable taking occurring under conditions less than those of imminent peril, as where there is a voluntary requisitioning of steamboats to transport troops or munitions of war, or of buildings to house soldiers or to store war materiel (i.e., *Harmony* and *Russell*).

In *Franco-Italian Packing v. United States*, 130 Ct. Cl. 736, 128 F. Supp. 408 (1955), this court had occasion to re-examine *United States v. Pacific R.R.*, *supra*. As a result

of that examination, the court, in an opinion written by Judge Laramore, declared:

The Supreme Court in *United States v. Pacific Railroad*, 120 U.S. 227, established the rule that the sovereign is immune from liability for confiscation of private property taken by defendant, through destruction or otherwise, to prevent it from falling into enemy hands, or to protect the health of troops, or as an incidental element of defense against hostile attack and is not compensable under the fifth amendment. [130 Ct. Cl. at 747, 128 F. Supp. at 414]

The above-quoted expression is admittedly dictum, but we think it announces a principle of law which should be applied in deciding the issues raised by the particular facts of this case.

As we have already noted, it is a thin line which the case law has at times drawn between sovereign immunity and governmental liability. The lack of more certain guidelines is unfortunate; however, we think it is at least clear that the decisions have rather consistently placed on the opposite sides of that line a temporary occupancy of private property which is immediately necessary for the safety of troops or to meet an emergency threatening great public danger and a voluntary appropriation of private property under conditions where there is no compulsive use or occupancy in the face of imminent danger. When the facts of this case are viewed in their entirety, it is our conclusion that they fall more nearly in the first category and, therefore, necessarily place the case on the sovereign immunity side of that fine judicial line.

In view of the unusual circumstances presented by the facts of the case, we think it is also appropriate to look for guidance to the relevant reports and expressions of the Congress, just as the Supreme Court did in *United States v. Pacific R.R.*, *supra*. In an elaborate report on claims growing out of the Civil War, the House of Representatives

distinguished between the temporary use of property as an urgent military necessity from other takings for war purposes. The report reads in pertinent part as follows:

By the principles of universal law recognized anterior to the Constitution, in force when it was adopted, and never abrogated, every civilized nation is in duty bound to pay for army supplies taken from its loyal citizens, and for all property voluntarily taken for or devoted to "public use."

But there is a class of cases in which property, real or personal, of loyal citizens may be temporarily occupied or injured, or even destroyed, on the theater of and by military operations, either in a loyal State or in enemy's country, in time of war, as a military necessity. The advance or retreat of an army may necessarily destroy roads, bridges, fences, and growing crops.

In self-defense an army may, of necessity, erect forts, construct embankments, and seize cotton bales, timber, or stone, to make barricades.

In battle or immediately after, and when it may be impossible to procure property in any regular mode by contract or impressment, self-preservation and humanity may require the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, and for necessary military operations which admit of neither choice nor delay.

In these and similar cases the question arises whether there is a deliberate voluntary taking of property for public use requiring compensation, or whether these acts arise from and are governed by the law of overruling military necessity—mere accidents of war inevitably and unavoidably incidental to its operations—and which by international law impose no obligation to make recompense. It seems quite clear that they are of this latter class.

The Government has always paid loyal citizens for the use and occupation of buildings and grounds in loyal States when used for officers' quarters, regular recruiting camps, and in cases where the occupation was voluntary and the result of choice, superinduced by no overruling military necessity, and for this the law provides.

But a temporary occupancy of real estate imposed by overruling necessity—an occupancy continued during the actual existence of such impending necessity—or the application of materials to purposes of defense in an emergency, has not, by the usage of the Government, been regarded as giving any claim for compensation. [H.R. Rep't No. 262, 43d Cong., 1st Sess., pages 39, 43.]

Mindful of the Supreme Court's caveat in *Caltex* that each case in this category must be judged on its own facts, we refrain from laying down any broad or general rule. We decide only that the temporary occupancy of plaintiffs' buildings and the damage inflicted on them by the rioters during such occupancy did not constitute a taking of the buildings for use by the Army within the contemplation of the fifth amendment as that amendment is interpreted by the authorities discussed above. It is abundantly clear from the record before us that the military units dispatched to the Atlantic side of the Zone by General O'Meara were not sent there for the purpose or with the intention of requisitioning or taking plaintiffs' buildings to house soldiers. Both buildings had previously been looted and damaged by the rioters. Colonel Sachse's men were ordered to remove the Panamanians from the buildings in order to prevent further loss or destruction and then to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone. After the Army troops became engaged in a pitched battle with a large and formidable mob and then only after one soldier was killed and many others

were injured by bullets and missiles, the troops were ordered into the buildings in order to avoid further casualties among them. During the temporary occupancy of the two buildings, they were under a sustained attack by the mob until the riot ended. Moreover, it is undisputed that all of the damages included in the main portion of plaintiffs' claim were inflicted by the rioters. Consequently, we hold that the loss is one which must fall upon the plaintiffs.

II

There remains for consideration that portion of plaintiffs' claim for loss of value and rental income arising out of alterations to the Masonic Temple, which the Government made after the cessation of the riot for the purpose of fortifying the building for use in any future riot. The alterations in the building were made to improve its security and to provide a reasonably safe place in which the Canal Zone police and the military could be stationed in the event of future disturbances in the area. Therefore, at Government expense, the windows and doors fronting 11th Street and Bolivar Avenue on the ground floor were sealed with concrete blocks and the wooden doors and windows on the other two sides were covered with sheet metal to make them fire resistant. Wire mesh was placed over all the windows on the second, third, and fourth floors, and steel shields were installed on the rooftop.

The only claim made regarding the changes is for the loss of value and rental income resulting from "sealing off the ground floor."

The plaintiffs contend that the alterations to the structure were forced upon them and that at no time did the officials of the Temple waive their right to claim a permanent loss as a result of the changes made by the Government. We find that this position is unsupported by the evidence, that the structural changes were made with the consent of the plaintiffs, and that a full accord and satisfaction was reached between the parties.

Plaintiffs correctly point out that on February 11, 1964, after the initial installations, the defendant by letter requested the Master of the Masonic Temple to confirm the fact that the changes in the building accorded with the prior verbal agreement of the parties. By reply of March 4, 1964, the master of the lodge replied that he had not specifically agreed to the complete blocking of the windows and doors on the ground floor and had understood that, in the future, the doors would be replaced and that some of the concrete window blocking would be replaced with glass brick. He ended the letter with the statement that he could not categorically agree that all the Government installations in the building were acceptable and that it might be necessary for the lodge to make a claim against the Government in the future. Had no further action been taken, plaintiffs might have a valid claim. The record is clear, however, that the parties subsequently agreed upon certain modifications in the installations which satisfied the lodge's request and conformed to its version of the verbal agreement. In reply to the March 4 letter, the Government, in a letter dated July 8, 1964, submitted to the master of the lodge a list of changes it was prepared to undertake, at Government expense, to comply with the lodge's wishes. These changes included, *inter alia*, replacing some of the concrete blocks used to seal the doors and windows of the ground floor with doors and sections of glass brick, plus plastering and painting the remaining concrete blocks. The master of the lodge replied on August 6, 1964, in part, that "I am pleased to advise you that the work outlined by you to be completed at Government expense will be considered as *full compliance with our agreement.*" [Emphasis added.]

The evidence submitted with the motions of the parties consists of the correspondence between them, and it shows that the structural changes in the Temple were made with the consent of the owner. There is no indication that either party at any time considered the changes to be a "taking" within the meaning of the fifth amendment. It is clear that

the only claim the Masonic Temple intended to reserve in its March 4, 1964, letter was one for specified unacceptable installations, and that those defects were later remedied to the full satisfaction of the owner. Moreover, plaintiffs have failed to support their claim with any evidence that the alterations decreased the value of the property or lowered its rental value. In the absence of such proof, we may assume that the structural changes were as much a benefit to the Masonic Temple as they were to the Government, inasmuch as such changes rendered the building less vulnerable to riot damage in the future.

III

Our conclusions stated above require the granting of defendant's motion for summary judgment, the denial of plaintiffs' motion for summary judgment, and the dismissal of plaintiffs' petition. It is so ordered.

DAVIS, *Judge*, dissenting in part:

On the question decided in Part I of the court's opinion,¹ this is an extremely close case, teetering on the balance. The court's view is certainly tenable and may be correct, but I have come to another conclusion and therefore explain it briefly. My disagreement turns on a difference, primarily, as to the legal significance of an emergency situation or imminent hostilities, and secondarily, as to the conclusion to be drawn from the specific facts of this case.

In one of its briefs the Government says: "the plaintiffs assume to be a matter of fact the seizure and use of their buildings *as a place of refuge and defense for American troops* (Pl. Br. pp. 14, 31), and on the basis of this convenient assumption argue that the United States must compensate them for its use of their property. Were their

¹ I join in Part II of the opinion.

assumption true, their argument based upon it would be correct." (Emphasis added.)² This statement reflects—together with its counterpart, quoted in note 2—the traditional rules as I understand them. Where private property has been destroyed or damaged as a result of armed conflict, the sovereign is not liable (i) if the damage was deliberately done to prevent its falling into enemy hands (denial destruction);³ or (ii) if the damage occurred (as variously put) in actual battle, by "the fortunes of war", "in the path of war", "by actual and necessary military operations", through bombardment or shelling, or in attacking or defending against the enemy.⁴ On the other hand, the Government is held liable where it first takes the property for its own military use, and then exposes the place to enemy attack or evokes one, leading to injury or destruction.⁵ In this connection, there is no exception from lia-

² The brief goes on: "However, the stipulated facts, which we shall review subsequently, clearly show that the plaintiffs' buildings were not appropriated by the Army for a public use, but were merely entered by the Army as an incident of its task of ejecting looters and rioters and restoring order in the Canal Zone" (emphasis added).

³ *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952).

⁴ See *United States v. Pacific R.R.*, 120 U.S. 227, 234-35, 238-39 (1887); *United States v. Caltex (Philippines), Inc.*, *supra*, 344 U.S. at 153-54, 155-56; *Perrin v. United States*, 4 Ct. Cl. 543, 547-48 (1868), *aff'd*, 12 Wall. 315 (1870); *Franco-Italian Packing Co. v. United States*, 130 Ct. Cl. 736, 747, 128 F. Supp. 408, 414-15 (1955); II Whiteman, *Damages in International Law* 1421 (1937).

⁵ See *Mitchell v. Harmony*, 13 How. 115, 133-34 (1852); *United States v. Russell*, 13 Wall. 623, 627-28 (1871); *United States v. Pacific R.R.*, *supra*, 120 U.S. at 234, 239; *Walker v. United States*, 34 Ct. Cl. 345, 347 (1899); Borchard, *Diplomatic Protection of Citizens Abroad* 262-64 (1915); II Whiteman, *op. cit.*, *supra*, at 1421; *Putegnati's Heirs (U.S. v. Mexico)*, IV Moore, *International Arbitration*, 3718-3720 (1898); *American Elec. & Mfg. Co. (United States v. Venezuela)*, Ralston's Report, 128 (1904); *Annuziata Petrocelli (Italy v. Venezuela)*, Ralston's Report 762, 763 (1904).

bility, as I read the materials, for temporary seizures for military use in the face of imminent hostility or to meet an emergency; once the property is taken for a military use, the Government is responsible for its subsequent injury, no matter how quickly that follows upon the seizure.⁶ The boundary between these latter "takings" and the "fortunes of war" cases is indeed thin, indistinct, and hard to trace. But these are our current guidelines, unsatisfactory though they be, and I do not see it as the function of this court, at this time, to alter them or build anew. We must apply them as best we can.⁷

⁶ See II Whiteman, *op. cit.*, *supra*, at 1421 ("Where, however, real property is used, occupied, etc. so as to expose that property particularly to enemy fire, compensation is made for such use on the ground that the property has been seized for public use and destroyed as so employed."); *Putegnat's Heirs*, *supra* (house seized and fortified, then destroyed by enemy forces); *American Elec. & Mfg. Co.*, *supra* (telephone plant damaged, after Government troops seized it during an attack); *Annuziata Petrocelli*, *supra* (government troops entrenched themselves in front of claimant's house and took possession of it, leading to an enemy attack).

The House Report (H.R. Rep. No. 262, 43d Cong., 1st Sess.) on which the majority relies does say that compensation need not be paid for "the temporary occupancy of houses for hospitals for wounded soldiers, or for the shelter of troops, or for necessary military operations which admit of neither choice or delay", but I do not think that, in this respect, the congressional report states the rule correctly. The authorities cited in footnote 5 and in the first paragraph of this footnote—particularly the actual decisions of international arbitral tribunals—are to the contrary. I do not understand the dictum in *Franco-Italian Packing Co. v. United States*, *supra*, 130 Ct. Cl. at 747, 128 F. Supp. at 414 (noncompensability of property seized "as an incidental element of defense against hostile attack") as covering a seizure of property for military use, and the subsequent destruction of that property, but merely destruction or injury by the Government's troops in the course of a battle.

⁷ Nor does the majority of the court attempt to refashion the governing rules, as it sees them.

To use the words of defendant's brief, was the Government's temporary occupation of plaintiffs' building "as a place of refuge and defense for American troops" or was it "as an incident of its task of ejecting looters and rioters and restoring order in the Canal Zone"?⁸ The former would be a compensable taking for military use even though destruction followed shortly; the latter a noncompensable incident of battle. As I appraise this record, the first is the better characterization of the facts. The United States troops cleared plaintiffs' holdings of rioters and looters before the occupation of the buildings, and took up stations in the street in front of the buildings; the soldiers remained there for a while and did not withdraw into the buildings until after sniper fire had begun, and this withdrawal was made to "protect the troops from the sniper fire and early sieges of Molotov cocktails";⁹ inside the buildings the soldiers erected barricades and took shelter, not only from the sniper fire but from the Molotov cocktail attacks which followed; also, a "command post" was set up in the Masonic Temple and an "observation post" on the top floor of that structure; the soldiers remained in the YMCA and the ground floor of the Masonic Temple for some 12 to 14 hours, and longer on the top of the Masonic Temple.

To me, all of this shows the seizure and use of both buildings "as a place of refuge and defense for American troops"—a place of protection, of shelter, of rest, of a com-

⁸ I judge from its briefs that the defendant's position on the legal irrelevance of an emergency situation or imminent hostilities—if a "taking" in fact occurs—is closer to mine than to the court's.

⁹ The United States' official presentation before the OAS said that the platoons were moved to the buildings "to provide more protection from the sniper fire"; the General Counsel of the Army said that the purpose of the withdrawal was "in order to protect the troops from the sniper fire"; the commanding officer of the U.S. Forces in Cristobal described the maneuver as providing "cover" for the troops from sniper fire.

mand post, and of an observation point. The assaults from the Panamanian side on the buildings (for which plaintiffs now seek recovery) came about because, and after, the United States troops had entered and occupied them. The buildings were "used, occupied, etc. so as to expose that property particularly to enemy fire" (II Whiteman, *op. cit. supra*, at 1421). The buildings' "destruction by the enemy * * * [was] a necessary consequence of the nature of the service to which, for the public benefit, the * * * [buildings] were subjected"; "the enemy destroyed the property indeed, but only after the Government had taken it for public use, by being used by the Government, and because it was so used" (*Putegnats Heirs, supra*). "When the Government's troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction" (*Annuziata Petrocelli, supra*, at 763).

Conversely, these facts show, to my mind, that the injury to plaintiffs' property did not occur directly "as an incident of [the troops'] task of ejecting looters and rioters and restoring order in the Canal Zone" (as defendant puts it), or because the buildings were shelled or burnt in the course of a running battle in the area (as were other structures in the Zone), or as "mere accidents of war inevitably and unavoidably incidental to its operations" (H.R. Rep. No. 262, *supra*).¹⁰

For these reasons, I would hold for the plaintiffs on this branch of their claim.

¹⁰ For instance, the damage to the structures occurring before the rioters were evicted by the troops or in the course of evicting them (losses for which plaintiffs do not ask recovery) is non-compensable. Similarly, no damages would be payable if the later injury to the buildings were caused by efforts of soldiers stationed on the street to put out fires, or to prevent the storming of the buildings, or to stop renewed entry by rioters into the buildings.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN ASSOCIATIONS, THE SOJOURNER'S LODGE, MASONIC TEMPLE, AND THE COMMERCE AND INDUSTRY INSURANCE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

In January 1964, rioting mobs of citizens of the Republic of Panama entered the Canal Zone, attacking and killing United States and Panamanian citizens and burning and looting property. When the number and force of the mob attacks overwhelmed the local police, the Commander of the Armed Forces in the Canal Zone assumed responsibility for quelling the

riot (Pet. App. 2a-3a). As part of that effort, troops were sent to Cristobal, on the Atlantic side, to drive rioters out and to seal that border from further encroachment. When they arrived, the troops drove rioters out of the YMCA building and the Masonic Temple, across adjacent Bolivar Avenue, and into the Republic of Panama. The rioters had seriously damaged those buildings and property in them. On the street in front of the buildings, the troops were confronted by a mob of about 3,000 people, which began to assault them with sniper fire, rocks, bricks, plate glass, and Molotov cocktails. One soldier was killed and two were wounded by sniper fire, and many others were injured by flying debris and Molotov cocktails (Pet. App. 3a-4a). In view of the deadly sniper fire, which the troops were ordered not to return, the commanding officer directed his men to withdraw from the street and take up positions in the YMCA building, the Masonic Temple, and the adjoining Old Commissary Building. These buildings were set afire by Molotov cocktails, forcing the troops to evacuate them after 14 hours (except for an observation post on the top floor of the Masonic Temple) and take up positions behind sandbags in a parking lot at the rear of the buildings. During the battle, two more American soldiers were killed and 10 more were wounded by sniper fire. After a siege lasting more than three days, the mobs were finally dispersed, leaving extensive damage to public and private property throughout the Canal Zone (Pet. App. 4a-6a).

Petitioners sued the United States to recover just compensation in the amount of \$245,192—the cost of

damages to the YMCA Building and the Masonic Temple which allegedly occurred after the Army entered the buildings—claiming that there had been an appropriation of private property for public use (Pet. App. 5a, 7a). The Court of Claims (one judge dissenting) denied recovery, holding that the temporary use of the buildings to meet an emergency threatening widespread devastation was not a compensable appropriation (Pet. App. 10a).

We submit that the decision below is correct. The troops were not sent to occupy the buildings; they were sent to expel the mob from occupying, looting, and damaging them. Equivalent or greater damage would likely have occurred if the troops had not intervened. In the absence of a statute, no government indemnifies those who suffer losses from a mob or "at the hands of a public enemy, or from intestine commotions or rebellion." *Louisiana v. Mayor of New Orleans*, 109 U.S. 285, 291 (Bradley, J., concurring); see *United States v. Pacific Railroad*, 120 U.S. 227, 234-235. A destruction of private property by hostile forces (organized or not) is not a loss for which the government owes compensation.

The fact that federal troops were summoned to quell the riot here does not suggest a different result. At all times, the soldiers were engaged in a pitched battle, involving great danger to themselves, against a force which threatened severe destruction of property and lives. The property which they stood on or behind—first the street, then the buildings, then the fortified parking lot—was not occupied or appropriated for federal use in any sense except for the immediate, tem-

porary defense of the state and the property of its citizens. The buildings were entered by the Army as an incident to its task of ejecting looters and rioters, preventing their reentry, and restoring order in the Canal Zone. Under the teaching of *United States v. Pacific Railroad*, *supra*, and *United States v. Caltex, Inc.*, 344 U.S. 149, compulsive use or destruction of property in such circumstances is not a compensable appropriation. As the Court said of *Pacific Railroad* in *Caltex*, “* * * the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with impunity, destroy the property of a few that the property of many and the lives of many more could be saved” (344 U.S. at 154). The fact that the property was “deliberately destroyed” in those cases is not a distinction favoring petitioners. If the government need not compensate for the destruction of property by our own forces “in times of imminent peril,” there is less reason to compensate for destruction by a common enemy of property which the government sought to defend.

The court below carefully limited its decision to the particular facts of this case, which plainly support the result under the principles of the foregoing cases. Petitioners present no new considerations warranting reappraisal of this Court’s decision in *Caltex*. Indeed, under the theory of “seizure and use” on which petitioners rely for recovery in this case, a fireman putting out a house fire would have “seized and used” the house, thereby creating a governmental liability to compensate for water damage.

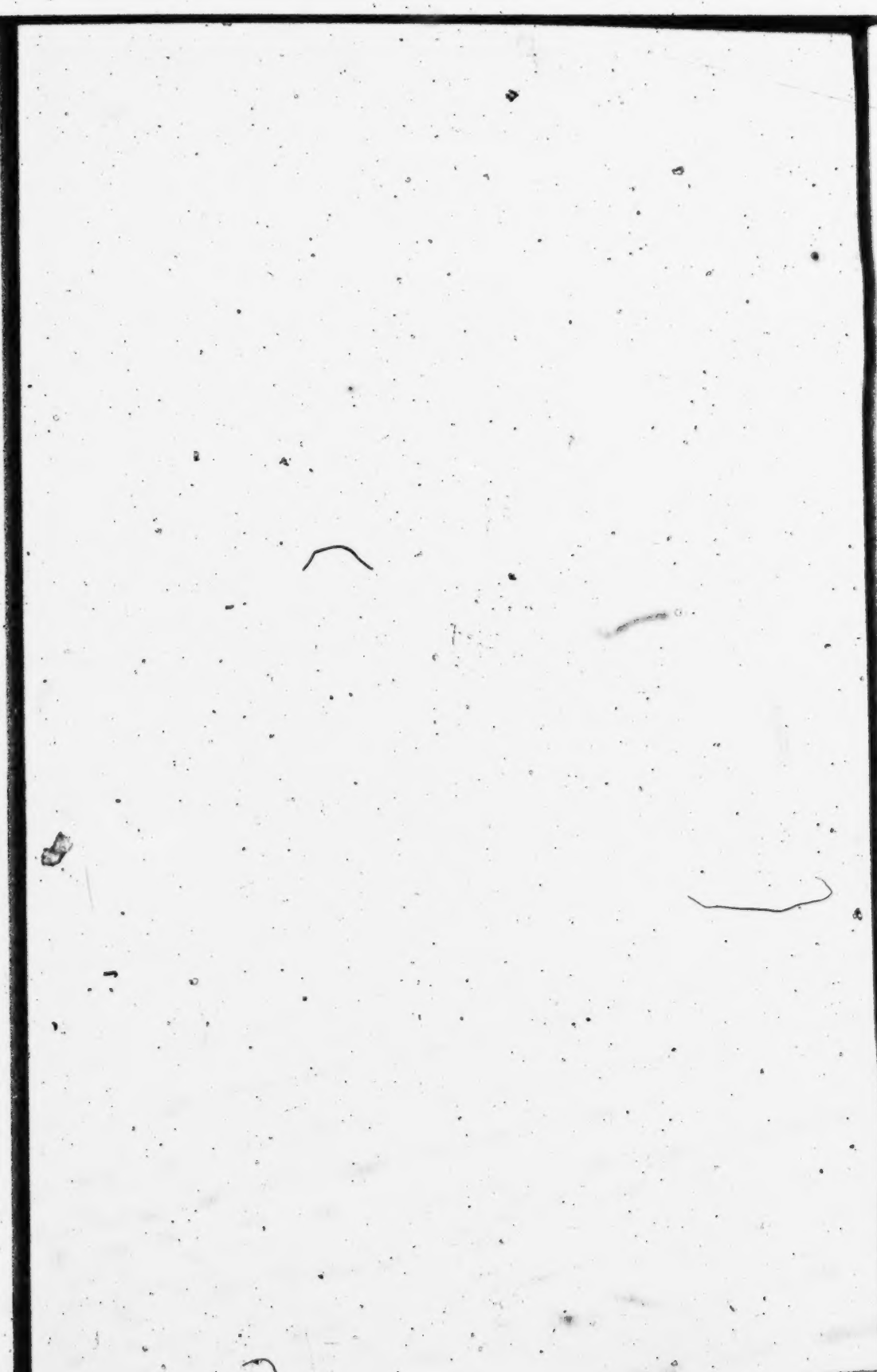
For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1968.



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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S
CHRISTIAN ASSOCIATIONS, ET AL., *Petitioners*

v.

THE UNITED STATES

BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S
CHRISTIAN ASSOCIATIONS, ET AL., *Petitioners*

v.

THE UNITED STATES

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Claims (J.A. 199a) is reported at 396 F. 2d 467 (1968).

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The petition for certiorari was filed on September 12, 1968, and granted on November 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the United States' obligation to pay just compensation under the Fifth Amendment is suspended during peacetime confrontations between U. S. military forces and private citizens.

2. Whether *United States v. Caltex* ought to be overruled.

STATEMENT

This is a joint claim for just compensation under the Fifth Amendment to the United States Constitution, arising out of the United States Army's seizure and use of petitioners' real property during the Panamanian riots of 1964. The basic facts have been stipulated (J.A. 21a)¹ and are not in dispute.

On Thursday, January 9, 1964, a long-smouldering dispute concerning the flying of Panamanian and American flags in the Canal Zone broke into open

¹ The parties stipulated in the court below that the basic facts of this case are not in dispute, since they were established and set forth in the official "United States Presentation" to the Select Committee of the Organization of American States, established under OAS/OC resolution of February 6, 1964, to investigate charges of American aggression in Panama in January 1964. It was agreed that the official United States oral and written presentations together with the other documents submitted to the court below contain a complete and accurate account of the events in question and the pertinent background facts related thereto. The portions of this material pertinent to the case in its posture before this Court, stipulated as the Appendix, consist of the "United States Presentation, Background and Chronology of the Events in Panama and the Canal Zone on the Ninth, Tenth, and Subsequent Days in January 1964," a "Fact Sheet" compiled by the Office of General Counsel of the Army, and pertinent portions of the "Transcript of the United States Oral Presentation on February 14th and 15th, 1964 to the Committee Established under the Resolution of the OAS/OC, February 6, 1964."

rioting (J.A. 26a-42a). The rioting occurred first in Balboa on the Pacific side of the Canal Zone (J.A. 41a-42a). By 8 p.m. on the 9th, demonstrations had broken out in Cristobal on the Atlantic side (J.A. 62a-63a). The buildings which are the subject of this joint claim are located in Cristobal. They are owned by Young Men's Christian Association (YMCA) and Sojourners Lodge of the Masonic Temple,² and are situated just inside the Zone at the intersection of Bolivar and 11th Streets. These streets form a right angle, and their centers constitute the boundary line between the Canal Zone and the Republic of Panama at that point (J.A. 65a, 222a).

The demonstrations in Cristobal remained "not violent" until about 9:30 p.m., at which time, the crowd became unruly (J.A. 63a, 95a). Rocks were thrown and windows were broken, resulting in damage to the Masonic Temple, the YMCA, as well as other buildings (J.A. 63a-64a, 95a-96a).

By 10:20 p.m., the first contingent of United States Army troops arrived in Cristobal. They were given the mission of clearing the area along the border, including the area in which the Masonic Temple and the YMCA were located (J.A. 65a, 96a-97a).³ The troops

² The YMCA and Masonic Temple are joined as a petitioner by the YMCA's property insurer which paid a portion of the loss under the limits of its policy and thus is subrogated to that extent of the YMCA's total loss (J.A. 11a).

³ At 7:59 p.m. the Acting Governor of the Canal Zone reported to the Commanding General of the United States Army Southern Command that he was unable to maintain law and order in the Canal Zone with only police and civilian authorities. The Acting Governor requested the Commanding General to assume command of the Canal Zone (J.A. 46a). Troops were immediately ordered to clear the Pacific side of the Canal Zone of demonstrators. Troops in the Atlantic side were put on alert (J.A. 46a).

cleared the rioters out of buildings (J.A. 47a), and took up guard positions on the boundary along 11th Street and Bolivar. The Zone was thus sealed off from the Republic of Panama (J.A. 65a-66a, 98a, 161a). As a result of this action, the troops were stationed in the streets directly in front of the Masonic Temple and the YMCA (J.A. 65a-66a, 98a). Their orders were to contain their fire at all costs (J.A. 66a). Meanwhile, the rioters began hurling "rocks, sticks, bottles, anything that they had," including Molotov cocktails, at the troops (J.A. 66a, 98a, 161a). There was also sniper fire from the Panama side (J.A. 66a, 98a, 162a). However, the troops were held to their standing orders not to return gunfire (J.A. 66a, 165a). "During these initial hours when the Infantry remained in position on the line, only tear gas grenades were used to contain the mob and discourage their attacks" (J.A. 99a).

The commanding officer of Company C then ordered the troops to withdraw into the Masonic Temple, the YMCA, and the Commissary Building "to protect the troops from the sniper fire" (J.A. 67a, 99a). Command and observation posts were set up inside the Masonic Temple (J.A. 68a, 100a).

In an apparent attempt to force the United States troops to abandon their positions, the rioters initiated a series of Molotov cocktail attacks against the wooden framed YMCA (J.A. 68a, 99a). By 2 p.m. on Friday, January 10th, the YMCA was in flames and the troops were forced to withdraw (J.A. 68a, 100a). The rioters then shifted their attack to the Masonic Temple with its Command Post (J.A. 68a, 100a). Although they succeeded in starting fires in the Masonic Temple, so that the Army was forced to move its Command Post, the building was not completely destroyed because of

its brick construction (J.A. 68a, 100a-101a, 165a-166a). Thus, although the Army decided to move its Command Post, it was able to maintain an observation post on the top floor of the Masonic Temple throughout the period from January 9th to the end of the disturbances on January 13th (J.A. 68a, 70a, 100a-101a, 165a-166a). During the afternoon of January 11th, the Army finally permitted a small group of expert marksmen to use shotguns, but only to fire against known snipers (J.A. 69a, 100a-101a, 165a). They were not permitted to fire upon the rioters who were throwing Molotov cocktails at any time during the disturbances (J.A. 101a).

After the riots were over, the Army inspected the petitioners' buildings and ordered them altered to provide further fortification in the event of future riots.⁴

Petitioners filed administrative claims with the Department of the Army under 10 U.S.C. 2733. These claims were denied (J.A. 12a-13a, 18a), whereupon petitioners filed the instant action in the Court of Claims seeking just compensation under the Fifth Amendment (J.A. 2a). The Government entered a general denial, and the matter was submitted to the lower court on cross-motions for summary judgment, based upon stipulated facts (J.A. 17a, 20a, 21a, 198a).

The Court of Claims, Judge Davis dissenting, granted the Government's motion for summary judgment.

⁴ In the court below, petitioners sought compensation both for (1) the loss sustained during the Army's seizure and occupation of the buildings and (2) the loss sustained through the alterations ordered after the end of the riots. The latter claim was denied by the court below upon its finding that there had been an accord and satisfaction between the Army and the petitioners (J.A. 211a). As this constituted a factual determination limited to this case, it is an issue which has not been pursued in this Court.

ment, denying petitioners' motions. The court found from the stipulated facts that the Army had moved the troops into the petitioners' building "in order to protect [the] . . . troops from sniper fire" (J.A. 202a), and that the private property served "as a temporary refuge for our military forces during an actual confrontation with hostile enemy forces" (J.A. 205a). Relying heavily upon this Court's decision in *United States v. Caltex*, 344 U.S. 149 (1952), the Court of Claims held that "a temporary occupancy of private property which is immediately necessary for the safety of troops or to meet an emergency threatening great public danger" is non-compensable under the Fifth Amendment. (J.A. 208a) Judge Davis agreed with the court's findings of fact but dissented from its statement of the controlling principles. In his view, the "traditional rules" demanded that compensation "must" be allowed under the Fifth Amendment for "the seizure and use of . . . buildings as a place of refuge and defense for American troops" (J.A. 213a, 215a). In support of this position he quoted the Government's position in its brief which conceded this to be a correct statement of the applicable law (J.A. 213a).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents a classic confrontation between the Government's right to seize private property in a time of need and the citizen's right to just compensation. Unlike many of the recent Fifth Amendment cases in this Court, it does not involve an application of the basic principles of just compensation to new and novel facts. Rather, it turns on occurrences strikingly similar to those envisaged by the

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early Seventeenth and Eighteenth Century writers and the judges at common law who developed the principles of just compensation.

In Part I of the Argument, we show that these basic principles of just compensation dictate that payment must be made for the loss in question unless there is an exception which is clearly applicable here. The Court of Claims found such an exception in *United States v. Caltex*, 344 U.S. 149 (1952), and hence in Part II we examine *Caltex*, and conclude that initially it is inapplicable on its face because of strikingly dissimilar facts. We then go on to examine the question of whether its rationale can be extended to support the result reached below. In so doing, we review *Caltex's* historical antecedents and conclude that they point to a duty of compensation, rather than its denial.

In Part III, we examine the question of whether *Caltex* itself is sound. We conclude that the decision is fundamentally foreign to the basic concepts of the Fifth Amendment and therefore ought to be overruled. In reaching this conclusion, we examine the cases relied upon in *Caltex* and conclude they would not and do not justify the result reached therein—either as square holdings or as interpreted in the light of our modern understanding of the Government's responsibility to provide just compensation where one individual's property is taken for the good of all.

**GENERAL PRINCIPLES OF JUST COMPENSATION DICTATE
THAT PAYMENT MUST BE MADE FOR THE TAKING OF
PETITIONERS' BUILDINGS FOR THE DEFENSE OF THE
CANAL ZONE**

Mr. Justice Story has said that the Just Compensation Clause of the Fifth Amendment "is an affirmation of a great doctrine established by the common law, for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government . . . almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." Story, *On the Constitution* § 234 (1840).

This view of the Fifth Amendment represents a reconciliation between the fact that the State has been delegated the authority to further the interests of the whole by taking private property *pro bono publico*, and the fundamental proposition that the interest of the individual is to be protected by the payment of just compensation. Thus, "a provision for compensation," said Chancellor Kent, speaking for the New York Court of Chancery in 1816, "is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property . . ." *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162. Similarly, the New Jersey Supreme Court of Judicature determined in 1839 that both the right of the State to take private property and the right of the individual to compensation for property taken, were so fundamental that they existed even in the absence of any con-

stitutional provision. *Sinnickson v. Johnson*; 2 Harrison (17 N.J.L.) 129.

The writers of the Seventeenth and Eighteenth Centuries, who had such an important influence upon the authors of our Constitution,⁵ refer time and again to this immutable principle. One of the most distinguished of these authorities, Grotius, recognized the right of Government to take private property for public use "in case of extreme emergency," but observed that

when this is done the State is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the State relieved from this *onus*, if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives.

⁵ Mr. Chief Justice Marshall, although discussing the meaning of the phrase *obligation of contract* in the Constitution, noted that "When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion" *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213, 353-354, (1827) (dissenting opinion). See Professor Corwin's highly illuminating discussion of this point in "The 'Higher Law' Background of American Constitutional Law," 42 Harvard L. Rev. 149-185, 365-409 (1928). For a recent and most incisive review of the connection between the writers of the Seventeenth and Eighteenth Centuries and the Constitution, see Antiean, *Rights of Our Fathers* (1968).

De Jure Belli et Pacis, lib. iii, c. 20, s. 7 (1625) at 326-327, Whewell's ed. (1853). Pufendorf (1672),⁶ Bynkershoek (1737),⁷ Vattel (1758)⁸ agree.

The seeds of this principle go back even further. In 1606 all of the Justices assembled in Parliament to

⁶ *De Jure Naturae et Genitum*, lib. i, c. 1, s. 19:

It is a matter of natural equity, when there is to be a contribution towards the preservation of anything possessed in common by those who share in it, that individuals should contribute only a proportional share, and that no one should be oppressively loaded beyond others. The same thing holds in States. But since often the exigencies of a government are such that either urgent necessity does not allow the fixing of the proportions of what is to be collected from individuals, or else some specific possession of one citizen, or of a few, is required for the necessary uses of the State, the supreme government must be able to apply this thing to the public necessities: provided, nevertheless, that what exceeds the proportional share of its owners, shall be refunded by the other citizens.

⁷ *Quest. Jur. Pub.*, lib. ii, c. 15:

But when a fit reason requires it, whatever he takes away, let him take it with as little harm to his subjects as may be, and upon paying the price out of the common chest. Whoever purposes anything else is rather a robber than a prince. . . . But for whatever reason the subject's property or claims (*res vel actiones*) are taken and destroyed, what Grotius adds . . . is fair and just, that the owner's compensation should be paid out of the public money.

⁸ *Le Droit des Gens*, lib. i, c. 20, s. 244:

And so when he disposes, in an exigency, of the property of a community or an individual, the alienation is valid, for the same reason. But justice demands that this community or this individual be made whole out of the public money; and if the State have not enough to do this, all the citizens are bound to contribute; for the expenses of the State should be borne equally or in a just proportion. In this respect it is like throwing merchandise overboard to save the ship.

rule on the King's prerogative concerning the digging and taking of saltpetre to make gunpowder. It was held that the Crown had a purveyance which permitted him to dig for saltpetre on private land, "inasmuch as this concerns the necessary defense of the realm," but, in digging, his ministers "are bound to leave the inheritance of the subject in so good plight as they found it" The court went on to say that:

[W]hen enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. . . . And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it, but after the danger is over the trenches and bulwarks ought to be removed, *so that the owner shall not have prejudice in his inheritance*

The Case of the King's Prerogative In Saltpetre, 12 Coke's Reports 12-13, 77 Eng. Rep. 1294, 1295 (1606) (emphasis added).

These principles have been made a part of the fundamental law of the United States. The right of the Government to take private property for public use, although not explicitly recognized in the Constitution, has been held to be vested in the Federal Government: "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law." *Kohl v. United States*, 91 U.S. 367, 371-372 (1875). Coupled with this right to take and use for public purposes is the duty of the general public to pay for what it takes. The Just Compensation Clause was designed to ensure that the duty

is carired out, i.e., to make whole the individual whose property has been appropriated so that he suffers no more than the rest of the public.

This natural and necessary corollary to the authority to take is embodied in the Constitution of every state in the Union except for North Carolina,⁹ where the same result obtains as a matter of law. *Johnson v. Rankin*, 70 N.C. 550 (1874).¹⁰ There is no wonder at this recognition, for here, as in England, a disregard of the right of compensation upon the taking of private property has been held to be contrary to the "unwritten law,"¹¹ to the "spirit of the Constitution,"¹² to "common-law doctrine,"¹³ against "nat-

⁹ See chart contained in 1 Nichols, *Eminent Domain* § 1.3, pp. 68-71 (1964).

¹⁰ See to the same effect: *Bondparte v. Camden & A.R.*, 3 Fed. Cas. 821, No. 1617 (C.C. N.J. 1830) (opinion per Baldwin, Circuit Justice); *Ex parte Martin*, 13 Ark. 198 (1853); *Young v. McKenzie*, 3 Ga. 31 (1847); *Parham v. The Justices*, 9 Ga. 341 at 349 (1851) ("This was the law of the land in England, before Magna Charta. Against the contrary the great Charta guarded . . . The petition of rights affirmed the same doctrine; and this great rule of right and liberty was the law of this state at the adoption of the Constitution. It is not, therefore, necessary to go to the Federal Constitution for it. It came to us with the common law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government."); *Bristol v. New Chester*, 3 N.H. 524 (1826); *Sinnickson v. Johnson*, 2 Harrison (N.J.L.) 129 (1839); *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816) (opinion per Kent, C.).

¹¹ *Virginia & Truckee R. R. v. Henry*, 8 Nev. 165, 171 (1873).

¹² *In the Matter of Albany Street*, 11 Wend. 149 (N.Y. 1834).

¹³ *Parham v. The Justices*, 9 Ga. 341, 351 (1851).

ural equity,"¹⁴ a violation of "natural justice,"¹⁵ and of "that sense of justice and right which is acknowledged and felt by the whole civilized world."¹⁶ The proposition was succinctly stated by the Supreme Court of Minnesota: "[P]ublic necessity, in time of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made." *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 460 (1910) (emphasis added). This right to compensation, "is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights become worthless if the government possesses the uncontrollable power over the private fortunes of the every-day citizen." *Chicago, B. & Q. R. R. v. Chicago*, 166 U.S. 226, 236 (1897) quoting 2 Story *Const.* § 1790.

Thus, the Fifth Amendment speaks in the absolute: "nor shall private property be taken for public use without just compensation." This Clause contains the "great doctrine established by the common law . . . founded in natural equity . . . a principle of universal law." Story, *On the Constitution* Sec. 394 (1840). Through the years, the general principles of this doctrine have become clear:

1. The taking which requires compensation may be of the fee, but it may be of less. It may be an easement, *United States v. Causby*, 328 U.S. 256, 261-62 (1946).

¹⁴ *Johnson v. Rankin*, 70 N.C. 550 (1874).

¹⁵ *Ex parte Martin*, 13 Ark. 198 (1853).

¹⁶ Mr. Chief Justice Marshall in *United States v. Percheman*, 7 Pet. (32 U.S.), 51, 87 (1833).

or it may be a servitude, *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922).

2. The taking may be in the form of a physical entry on the land, but it need not be. See *United States v. Causby, supra*; *Portsmouth Harbor L. & H. Co. v. United States, supra*; *Baltimore & Potomac R. v. Fifth Baptist Church*, 108 U.S. 317 (1883); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 179 (1958) (dissenting opinion of Mr. Justice Harlan).

3. The occupation and use of the property may be with formal proceedings provided by statute or it may be an informal, or *de facto*, taking where no formal proceedings are ever brought. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291 (1958); *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

4. The occupation and use by the sovereign may be permanent, but a temporary occupation and use is nonetheless a taking requiring compensation. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp., supra*; *Alexander v. United States*, 39 Ct. Cls. 383 (1904);¹⁷ *Johnson v. United States*, 4 Ct. Cls. 248 (1868);¹⁸ *McKeon v. New York, N.H.&H.R.*, 75 Conn. 343, 347 (1902), affirmed

¹⁷ United States held liable for damage done to private property during 44-day occupation and use as a military encampment due to "military necessity." 39 Ct. Cls. at 396.

¹⁸ The court held that the temporary occupancy of land raised an "implied lease" for which compensation was due. 4 Ct. Cls. at 250.

per curiam, 189 U.S. 508 (1903).¹⁹ Cf. *Brigham v. Edmands*, 7 Gray (73 Mass.) 359 (1856).²⁰

5. Intent to take is not a crucial factor, for its absence does not free the Government from the duty of compensating where there has been a taking. See *e.g.*, *United States v. Dickinson*, 331 U.S. 745 (1947); *Causby, supra*; *General Motors, supra*; *Jacobs v. United States*, 290 U.S. 13 (1933); *Sioux Tribe v. United States*, 315 F. 2d 378 (Ct. Cls. 1963).

6. Where there is a physical occupation, the taking becomes complete and the duty to compensate arises at the moment of occupation. As this Court stated in *United States v. Dickinson*, 331 U.S. 745, 751 (1947): "The land was taken when it was taken and an obligation to pay for it then arose."²¹

¹⁹ That the occupation was "temporary" and was then removed was held to be only important in determining the amount of compensation to which he [the plaintiff] is entitled." 75 Conn. at 347.

²⁰ Although there was an occupation and use of property by a military unit for only three days, the court held the plaintiff entitled to compensation, as there was "an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage." 7 Gray at 363. As the occupation was held to be unauthorized, the military commander was held personally liable.

²¹ There are two more elements not here at issue. First, the taking must be for a public use or necessity, *Wilkinson v. Leland*, 2 Pet. (27 U.S.) 627 (1829); *Cole v. Le Grange*, 113 U.S. 1 (1885), although what constitutes a public use or necessity is not always clear and certain. Finally, the taking must be authorized, *United States v. North American Transp. & Trading Co.*, 253 U.S. 330, 333 (1920); but see Abend, "Federal Liability for Takings and Torts," 31 Fordham L. Rev. 481, 492 (1963), or the individual and not the State is liable to the private owner. *Mitchell v. Harmony*, 1 How. (54 U.S.) 115 (1851); *Brigham v. Edmands*, 7 Gray (73 Mass.) 359 (1856).

Applying these principles to the instant case, it is clear that the physical use and occupation of petitioners' land and buildings constituted a *taking*. The occupation was for a public use, since its ultimate purpose was protection of property and persons within the Canal Zone and defense of the vital interest of the United States in the Panama Canal. The immediate purpose, tending toward the ultimate, was the placing of the troops defending the Zone in a place of relative safety and refuge where they could carry out their ultimate mission more effectively with a minimum number of casualties. We do not dispute that the military commander who ordered his troops from the streets into this place of refuge and relative safety had the right to do so. Nor is there any question that when the Army ceased its use and occupation of petitioners' buildings and returned them to petitioners, they were in substantially worse condition than when the Army's use and occupation began.²²

The principles of natural justice and equity enveloped in the Just Compensation Clause of the Fifth Amendment, but antedating that Clause by many centuries, dictate that, when petitioners' private property was taken for the good of all, petitioners should not have to bear more than their proportional share of the loss. The general principles of Fifth Amendment developed by this Court demand a similar result.

²² As has been noted previously (n. 4, p. 5, *supra*), no claim is made here for damage done to the buildings by the rioters prior to their expulsion, or by the troops in expelling them. This claim involves only damage suffered *subsequent* to the Army's reoccupation of the buildings as a command post, refuge and fortification. Nor is any claim made here for injury caused the petitioners by the alterations to the buildings *after* the Army's occupation ended and the buildings were returned to petitioners.

These principles must govern in this case—unless there be an exception which would require that one individual bear the loss which benefits all.

The Court of Claims found such an exception in this Court's decision in *United States v. Caltex*, 344 U.S. 149 (1952). It is petitioners' position, as developed in Part II below, that *Caltex* has no application to this case, and its extension or utilization to create a new exception is unwarranted and destructive of these basic principles. However, should this Court agree with the Court of Claims that *Caltex* is controlling, then it is petitioners' view, as developed in Part III of the Argument, that *Caltex* is wrong and ought to be overruled.

II.

NO EXCEPTION TO THE JUST COMPENSATION CLAUSE PERMITS DENIAL OF COMPENSATION FOR PROPERTY TAKEN BY THE MILITARY FOR PUBLIC USE DURING A PEACETIME CONFRONTATION

A. The Caltex Holding Is Inapplicable to the Facts of This Case

Caltex was an action for the value of terminal installations and equipment owned by the plaintiff oil companies and located in the Philippine Islands. The property was deliberately destroyed by the United States Army to prevent their falling into the hands of the advancing Japanese forces at the outbreak of World War II. The Court of Claims held that the Army's action amounted to a taking for which the Fifth Amendment required that the oil companies be justly compensated. This Court reversed (Justice Black and Douglas dissenting), holding that there was no compensable taking since the property "was destroyed, not appropriated for subsequent use," 344 U.S. at 155. Building on the rationale of *United States v.*

Pacific R. R., 120 U.S. 227 (1887), the Court stated that there is no obligation on the part of the United States to "make whole all who suffer from every ravage and burden of war. . . . [I]n wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign." 344 U.S. at 155-56 (emphasis added). While this Court recognized that there were no rigid rules to distinguish compensable from non-compensable losses, it found the loss in *Caltex* to be noncompensable because, *inter alia*: "[T]his property, due to the fortunes of war, had become a potential weapon of great significance to the invader. . . . It was destroyed that the United States might better and sooner destroy the enemy." 344 U.S. at 155. In so doing, however, the Court did not overrule its earlier decisions in *Mitchell v. Harmony*, 13 How. (54 U.S.) 115 (1851), and *United States v. Russell*, 13 Wall. (80 U.S.) 623 (1871), which held that the Government was liable for property which was taken and used, but not deliberately destroyed, by U. S. forces in time of war.

While petitioners respectfully question the wisdom of the *Caltex* rule (see Part III of the Argument, *infra*, pp. 34-43), a comparison of the facts of this case with those in *Caltex* makes it clear that the Court of Claims erred in extending the *Caltex* holding to fit these facts. *Caltex*, whatever its validity, depends upon the following elements:

- 1) Deliberate destruction of property (as distinguished from use and occupation);
- 2) In time of war;
- 3) For the purpose of denying the enemy a weapon (or other property of military significance) which

would have fallen into their hands if not destroyed.

None of these elements is present in the instant case.

1) Petitioners' property was seized for use and not destruction. The Army occupied petitioners' buildings and land as a place of refuge from the stones, bullets, and Molotov cocktails which were being directed at the troops. Indeed, the use was even broader since the buildings were converted into a command post as well as a fortification or rampart from which the Army maintained its defense of the border, thus protecting the entire Zone at that critical point. In terms of the facts of *Caltex*, there was no purpose on the part of the Army to destroy, but rather to preserve and use petitioners' buildings for the good of the entire Zone.

2) The events in question did not constitute a "war" by any stretch of logic. Rather, they involved a peacetime confrontation between rioting and looting civilians and the authorities responsible for public safety. The fact that United States military forces were needed to assist in this process certainly did not place the United States at war with the Republic of Panama or any other power. Thus, the United States Government, in its presentation to the O.A.S., constantly reemphasized our nonbelligerent status. It stated time and again that its troops were engaged in essentially a "riot control function," acting with the utmost restraint in the face of "relatively small crowds who were being exhorted by individual agitators" (J.A. 89a-90a, 186a-187a, 191a). The restrictions on the use of even the most elementary weapons, described above, are perhaps the best evidence of the distinction between the Panamanian situation and a "war."

3) There is no indication in the record that the buildings in question would have been seized and used by the rioters as an "offensive weapon" if the troops had not occupied them. Nor is there any suggestion that the Army ever considered deliberately destroying the buildings to prevent them from falling into "enemy" hands. Rather, the sole purpose in the seizure and use was to provide a defensive facility to the Army—a use which eventually attracted the mob's concentrated response.

Ultimately, the *Caltex* decision can best be characterized in the words of Mr. Justice Harlan, as involving that "extraordinary situation where private property is destroyed by American armed forces to meet the exigencies of the military situation in a theatre of war . . .," *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (dissenting opinion). The factual elements of that "extraordinary situation" simply are not present here.

B. The Court Below Erred in Extending the Caltex Exception To Apply to a Use of Private Property "Immediately Necessary for the Safety of Troops or To Meet an Emergency Threatening Great Public Danger."

The Court of Claims read the *Caltex* decision as enunciating a broad doctrine that would immunize the United States Government from any "losses attributable to the fortunes of war or public necessity in times of imminent danger or peril." The Court of Claims specifically held that this doctrine applies when the military, for the good of the community as a whole, takes an individual's private property for "temporary occupancy" where it is "*immediately necessary for*

the safety of troops or to meet an emergency threatening great public danger" (Emphasis added.) This holding represents an extraordinary and unwarranted extension of the *Caltex* decision, one which is basically at odds with *Caltex's* historical antecedents.

1. *The Earlier American Case Law.*

This Court in *Caltex* and the court below in the instant case relied heavily on *United States v. Pacific R.R.*, 120 U.S. 227 (1887), which centered upon a Government counterclaim for the cost of railroad bridges built by the Army during the Civil War as a matter of "military necessity" to replace four bridges, two of which had been destroyed by the enemy and two by Union forces. 120 U.S. at 231-32. The Court held that there was no obligation for the railroad to pay for work done, "not at its request or for its benefit, but solely to enable the government to carry on its military operations." 120 U.S. at 233. The Court then went on to examine the somewhat hypothetical question of whether the railroad could have recovered from the Government for the two bridges previously destroyed by the Union Army.²³ The Court concluded that if the railroad had sought to recover the value of those bridges from the Government, the Court would have been obliged to find the Government exempt from "liability for private property injured or destroyed during war, by the operation of armies in the field, or by

²³ As this Court recognized in *Caltex*, this discussion was dicta. 344 U.S. at 153-154. Indeed, the gratuitous nature of the Court's discussion is even clearer when it is realized that neither holding nor dicta drew a distinction as to who had destroyed the bridges.

measures necessary for their safety and efficiency”
120 U.S. at 239.²⁴

In so doing, this Court turned to the writings of Vattel for guidance as to what losses of an individual in time of war are compensable from the general treasury and what losses must be borne by the person upon whom they fall. This reference was particularly apt for the writings of Vattel, along with those of Grotius, Bynkershoek, Pufendorf, and Locke express the basic historical considerations underlying the Just Compensation Clause.²⁵ Vattel draws a distinction between two kinds of losses occasioned by a government's military actions:

(1) *Noncompensable*: those that are “merely accidents—they are misfortunes which chance deals out to the proprietors on whom they happen to fall.” Vattel terms these losses as being caused by “inevitable necessity” and gives as an example “the destruction caused by the artillery in retaking a town from the enemy.”

(2) *Compensable*: those that are done “deliberately and by way of precaution.” Vattel gives

²⁴ Petitioners respectfully submit that the omitted portion of the sentence quoted in the text indicates that the *Pacific Railroad* Court did *not* intend that losses such as are involved here were to be exempted from the protection of governmental liability. For the Court went on: “. . . we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as . . . buildings to be used . . . to house soldiers or take care of the sick, or claims for supplies seized and appropriated.” 120 U. S. at 239.

²⁵ See Grant, “The ‘Higher Law’ Background of the Law of Eminent Domain,” 6 *Wisc. L. Rev.* 67 (1931); Corwin, “The ‘Higher Law’ Background of American Constitutional Law,” 42 *Harv. L. Rev.* 149 and 365 (1928); Antieau, *Rights of Our Fathers* (1968), particularly chapter one.

two categories of examples here: "when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart, or any other piece of fortification;" and "when his standing corn or his storehouses are destroyed, to prevent their being of use to the enemy."²⁶

Except for *Caltex* the decisions of this Court are in agreement with this analysis. In *United States v. Russell*, 13 Wall. (80 U.S.) 623 (1871), it was held that the owner of steamboats seized by the Government during the Civil War—and used to transport Union forces—was entitled to compensation. The Court noted that although normally compensation is a "condition precedent . . . to the right of the government to deprive the owner of his property without his consent," in "certain extreme cases" property may be taken and compensation paid later (13 Wall. at 627-28):

Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use.

²⁶ *Le Droit des Gens*, lib. iii, c. 15, s. 232 (1758).

"[I]t is the emergency," the Court went on, "that gives the right [to take], and it is clear that the emergency must be shown to exist before the taking can be justified." *Id.* at 628. When this justification is shown, the officer taking the property is not a trespasser and "the government is bound to make full compensation to the owner." *Id.* In *Russell* the order impressing the steamboats into Army service recited the "imperative military necessity." As the facts showed that the emergency justified the order, the Court ruled that the Government "is bound to make full compensation to the owner for the services rendered." 13 Wall. at 629. The Court went on to summarize the rule in terms of the competing values discussed above (*id.*):

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.²⁷

²⁷ The Court determined that a contract, based upon a theory of *indebitatus assumpsit*, arose between the United States and *Russell*. In so doing the Court avoided the prohibition of the Act of July 4, 1864, 13 Stat. 381, which took away the Court of Claims' jurisdiction to hear any "claim against the United States, growing out of the destruction or appropriation of, or damage to property by the army or navy" during the Civil War. That the Court of

Russell relied in part on this Court's earlier decision in *Mitchell v. Harmony*, 13 How. (54 U.S.) 115 (1852). There an army officer was sued individually for having ordered the owner of wagons and mules to accompany U.S. troops into battle, the result of which was loss and damage to the property involved. The officer, represented by the Attorney General, argued that the order was justified by the fact that the troops were far from supplies, on a dangerous expedition, and that within the honest judgment of the officer the order was necessary. This Court disagreed, holding that the lower court correctly instructed the jury that there must be "an immediate and impending" danger from the public enemy or "a necessity urgent for the public service such as will not admit of delay," to justify the taking of private property by a military commander. In so holding, the Court, speaking through Mr. Justice Taney, emphasized: "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." Where there is such an emergency, the officer is not a trespasser, but "[u]nquestionably, in such cases, the government is bound to make full compensation to the owner" 13 How. at 133-34.

As noted earlier in *United States v. Pacific R. R.*, 120 U.S. 227 (1887), the bridges were destroyed by both the Confederate and the Union forces during the

Claims could grant compensation for a taking of private property on a theory of implied contract where there is no dispute concerning title has been long settled. See *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 335 (1920); Abend, "Federal Liability for Takings and Torts," 31 *Fordham L. Rev.* 481-94 (1963).

heat of battle.²⁸ Thus as Mr. Justice Harlan concluded, "Except in the extraordinary situation" of *Caltex*, "no case in this Court has held that the Government is excused from providing compensation when property has been 'taken' from its owners during wartime in the interest of the common good." *United States v. Central Eureka Mining Co.*, 357, U.S. 155, 182 (1958) (dissenting opinion).

If it requires an "extraordinary situation" to deny compensation in time of war, surely there can be no situation in time of peace which would justify denial of compensation to an owner whose property has been seized and used by U. S. military forces.

2. *The English Common Law.*

In *Caltex*, this Court reiterated its long-standing recognition that the common law is a source of construction of the Fifth Amendment. 344 U.S. at 154. Although there are certain references in the Year-

²⁸ It is not clear from the facts as reported, under what circumstances the bridges were destroyed, but, as the House of Lords concluded in analyzing the case, no other assumption can reconcile the conclusion with Vattel and the other authorities cited by the Court. *Burmah Oil Co., Ltd. v. Lord Advocate*, [1964] 2 All E.R. 348, 362, 392, 399.

Juragua Iron Co. v. United States, 212 U.S. 297 (1909); *Herrera v. United States*, 222 U.S. 558 (1912), and *Diaz v. United States*, 222 U.S. 574 (1912), are not contrary to the principles developed in *Harmony*, *Russell* and *Pacific Railroad*, for the compensation was denied in the former three cases on the ground that the property destroyed was that of the enemy for which the United States could not have been held liable to the individual owner. See 212 U.S. at 306, 308-309, 222 U.S. at 569.

books,²⁹ the earlier cases most often regarded as the genesis of the Just Compensation principle in the common law are *The Case of the King's Prerogative in Saltpetre*, 12 Coke's Rep. 12, 77 Eng. Rep. 1294 (1606), and *Mouse's Case*, 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608).

Saltpetre was decided shortly after gunpowder became important to the defense of England. It involved the rights and duties of the Crown in connection with the acquisition of the basic mineral compounds of gunpowder. The judges in Parliament found that saltpetre "concerns the necessary defense of the realm" and hence, held that the King had the right of purveyance. By this, they meant that the Crown could preemptively purchase saltpetre but, at the same time, they held that payment was required. See 1 Blackstone *Commentaries on the Laws of England* chap. 8, par. VI, p. 215 (U.S. ed. 1836); *Attorney General v. De Keyser's Royal Hotel*, [1920] A.C. 508, 571, [1920] All E.R. 80, 107. The Crown was also regarded as having the right to go upon a private person's land to take saltpetre. However, in so doing, the ministers of the Crown were to "leave the inheritance of the subject in so good a plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinheritance of the subject, which the King by prerogative cannot do" *Saltpetre*, 12 Coke's Rep. at 12-13 (1606).

²⁹ Y.B. 12, Henry 8, f. 16, c. 1 (1521); Y.B. 21, Henry 7, p. 27, c. 5 (1506), in Brooke's *Graunde Abridgement*, p. 293, c. 213; Y.B. 8, Edw. 4 (1468), in Brooke's *Graunde Abridgement*, p. 207, c. 45, all referred to in *Burmah Oil Co., Ltd. v. Lord Advocate*, [1964] 2 All E.R. 348, 385.

In reaching this conclusion the Court referred to the right of "every man" to "come upon my land for the defence of the realm," and that "on such extremity they may dig for gravel, for the making of bulwarks: for this is for the public, and every one hath benefit by it" *Id.* Although "a thing for the commonwealth every man may do without being liable to action," this does not mean that the person whose private property is used for the bulwarks shall suffer the loss alone, "but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance." *Id.*

Mouse's Case provides a similar rule: When a ship is in danger and it becomes necessary to throw one person's goods overboard in order to save the possessions and lives of all, the action is justifiable and the owner may not recover the value of his goods from the one who threw them overboard. But again, "every man ought to bear his loss"—meaning that all who benefit from the sacrifice are to share in the loss of he whose goods were sacrificed. 12 Coke's Rep. 63 (emphasis added). See *Burmah Oil Co., Ltd. v. Lord Advocate*, [1964] 2 All Eng. Rep. 348, 383 (H.L.); *Hallett v. Wigram*, 9 C.B. 580, 137 Eng. Rep. 1018, 1027 (1850).

These basic principles have been repeatedly applied by English courts to situations of military necessity. Necessity gives the right on the part of the military to take and use private property, see Chitty, *Prerogatives of the Crown*, ch. 4, sec. 5, p. 44, but "there is no such necessity to take without compensation, if in fact the Crown or the state has the means to pay." *Burmah Oil, supra*, at 384; *Attorney General v. De Keyser's*

Royal Hotel, [1920] A.C. 508, 529, 542, 562, 569, [1920] All E.R. 80, 87, 94, 104, 105.

A search made in connection with the case of *De Keyser's Royal Hotel* led the House of Lords to conclude that at least since 1660 there was "not a single instance in which there was a taking or interference with land or personalty for military necessity without payment having been made. See *Burmah Oil*, [1964] 2 All E.R. at 354. Lord Reid of the House of Lords concluded in *Burmah Oil*: "Negative evidence may not amount to proof, but it is so strong that I would hold it established that the prerogative was never used or attempt to be used in that way in modern times" *Id.* Lord Pearce in the same case concluded that the search of the Crown records in *De Keyser* "have shown . . . a practice of compensation maintained from early times." *Id.* at 387.

3. *The International Cases.*

As a practical matter, principles of international law ultimately turn upon the same considerations of natural justice and equity which underly the Just Compensation Clause. The pertinent international principle has been summarized as follows:

Where property is damaged in the path of war, under the necessities of war, damages will not be allowed. Where, however, real property is used, occupied, etc. so as to expose that property particularly to enemy fire, compensation is made for such use on the ground that the property has been seized for public use and destroyed as so employed.

2 Whiteman, *Damages in International Law* 1421 (1937) (emphasis added).

These principles were applied in various international arbitrations. For example, compare *Shattuck's Case* (1868) and *Riggs Case* (1868), in IV Moore, *International Arbitration* 3668 (1898) with *Putegnats Heirs* (1871), in *Id.* at 3718-3720. In *Shattuck* compensation was denied upon a finding that the damage to the claimant's farm and crops was caused by the armies of both sides passing through and fighting over the land. This was determined to be "the result of the inevitable accidents of a state of war" and hence noncompensable. In *Riggs* compensation was likewise denied upon a finding that the battle took place upon the claimant's property. In *Putegnats Heirs*, on the other hand, the claim involved goods within a house that had been seized and converted into a fortification by the Mexican Army. The goods were then destroyed by fire set by shells of the enemy. American Commissioner Wadsworth awarded compensation, concluding that there had been "a seizure of the house and goods . . . for the public service, and their destruction by the enemy [was] a necessary consequence of the nature of the service to which, for the public benefit, the goods were subjected." Citing *Vattel*, *Mitchell v. Harmony* and other cases, Commissioner Wadsworth held that the Government must pay compensation for the property so taken and used as a source of refuge and defense (emphasis added):

There cannot be much doubt about the general principles. Is there any doubt about their application in this case? The enemy destroyed the property indeed, but only after the government had taken it for public use, by being used by the government, and because it was so used. It will be found to be an immaterial fact that the enemy destroys the property after the government has

found it necessary to seize it and use it against the enemy. The horses, wagons, etc., impressed by the government forces for use against the enemy or in the public service in general, although only a temporary use was intended, must be paid for, although destroyed or captured by the enemy. *It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy or the government, that entitles the owner to payment.*

Similarly, in *American Elec. & Mfg. Co. (United States v. Venezuela)*, Ralston's Report, p. 128 (1904), compensation was awarded to a corporation for damage to its telephone plant which occurred after the Venezuelan troops had taken possession of the plant during an attack by revolutionaries. The rationale was that the losses were due to the "previous and deliberate occupation by the Government for public benefit or as being essential for the success of military operations." And in *Annuziata Petrocelli (Italy v. Venezuela)*, Ralston's Report 762 (1904), compensation was awarded to an Italian claimant for damages inflicted by the rebels after Government troops had entrenched themselves in front of the claimant's house. The Commissioner stated (*id.* at 763):

When the Government troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction. The claimant's property was exposed to a special nature, in which the property of the rest of the community did not share. The Government's responsibility for its safe return was complete. The principle

upon which such responsibility rests is above indicated, and is more at large set forth in 4 Moore, page 3718, Putegnats Heirs, decided by the American-Mexican Commission formed under the treaty of 1868, which decision was recently followed in the case of American Electric and Manufacturing Company v. Venezuela.³⁰

4. *Application of Historical Antecedents.*

The court below extended the *Caltex* rationale to the facts in the instant case. Determining the soundness of this extension necessarily involves the question of whether the historical underpinnings of *Caltex* can be construed to support that extension. As we have demonstrated above, neither the basic American case law, the English common law, nor applicable principles of international law justify the result below.

In the instant case, there is no doubt concerning the necessity of the situation. Necessity permitted the Government to seize, occupy, and use these buildings for the purpose of defending the entire Zone. But, as demonstrated by the principles developed above, neces-

³⁰ See also Borchard, *Diplomatic Protection of Citizens Abroad*, 262-64 (1915); *Walker v. United States*, 34 Ct. Cls. 345, 347 (1899).

It is also of note that at least since 1863 it has been official United States instruction to its troops in the field to give receipts for and make payments for land and personalty taken from foreign citizens. See the Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, issued by the President, April 24, 1863 (known as the Lieber Code), VII Moore, *Digest of International Law* 173 (1906); War Department Rules of Land Warfare of 1940, No. 339; Dept. of the Army, *Law of Land Warfare*, 1956 (F. M. 27-10) Nos. 407-09, 412.

sity does not require that one person shall bear the entire loss for the good of the whole. The damage that occurred here was not battle damage so as to make the person whose property was lost bear it alone. These buildings were not damaged and destroyed by random artillery or bombs or bullets used to dislodge the enemy or any of the events described as "mere accidents by Vattel. Rather, this case involves a deliberate taking by the Army of these buildings for a place of command, refuge, and fortification. This taking was for the good of the whole community. However, the community, in the form of the Government, has refused to share that loss.

Denial of compensation by an improper extension of *Caltex* ultimately impairs the balance between the Government's right to seize and the citizen's right to protection of his property. For the necessary effect of the lower court's ruling is that the Government is now virtually immune from liability under the Fifth Amendment for the actions of U.S. forces in any past, present or future riot involving intense confrontations between federal troops and aroused citizens. So long as an "immediate danger" is claimed to be present, the troops can, under the present holding, seize and use property on a "temporary" basis without incurring liability for any loss which might occur during that use. Such a "danger" will be inevitably present or potentially present whenever the situation reaches the point at which federal troops must be called in.

By any standard this is an extraordinary result. We believe it is visably at odds with the basic philosophy of the Fifth Amendment, and that it ought to be reversed.

III.

THE DECISION IN U. S. v. CALTEX OUGHT TO BE
RE-EXAMINED AND OVERRULED

If this Court should find that *Caltex's* rationale can somehow be extended to support the result below, then we respectfully urge that this Court's decision in *U.S. v. Caltex* be re-examined and overruled. For its underlying assumption that the Government must be able to seize and destroy property in time of war without regard to the niceties of compensation at a later date is essentially foreign to the basic concept of the Fifth Amendment and its guarantee of the use and enjoyment of private property. The proper philosophy was expressed by Justice Douglas dissenting in *Caltex* with Justice Black [344 U.S. at 156]:

I have no doubt that the military had authority to select this particular property for destruction. But whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprives the enemy of a valuable logistic weapon.

It seems to me that the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

We believe that the "guiding principle" enunciated by Justice Douglas is and should be the guiding principle today. Its essential forthrightness and soundness

are as valid today as they were in 1952 or at the time of the adoption of the Fifth Amendment.

The decision below rejects that principle in favor of a somewhat limited view of the Government's responsibility. It correctly asserts that the Government has a duty to protect the public in general and that this duty includes the seizure and use of private property when necessary. But this is not and never has been the true issue. Rather the question is who pays for losses arising out of or occurring during that seizure and public use.

We have shown in Part II of the Argument that basic principles authorized the public, acting through its Government, to take and use private property when it is for the good of all. Natural justice and equity demand as well that the community which benefits from the sacrifice of the property of one person should contribute to its restoration. This is certainly true of a taking and use—as even *Caltex* recognized. The fact that the “use” in *Caltex* was a destruction should be of no constitutional significance. For the duty to provide compensation in such a case has been recognized as far back as *Mouse's case*, 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608), where the court, while holding that one man's goods might be thrown overboard to save a foundering ship and the owner shall have no remedy against the person who threw the goods over, ruled as well that the loss of the one hapless individual should be borne by all who were saved by his sacrifice. See *Burmah Oil Co., Ltd. v. Lord Advocate*, [1964] All E.R. 348, 383 (H.L.); *Hallett v. Wigram*, 9 C.B. 580, 137 Eng. Rep. 1018, 1027 (1850). This principle was recently reaffirmed by the House of Lords in *Burmah*

Oil, where Lord Reid remarked that "it was *rightly* not argued that the fact that property is taken for destruction and not for use can make any difference," and again, "there is no difference in principle between taking for use and taking for destruction." *Id.* at 355, 361 (emphasis added).

In *Caltex*, a majority of this Court rejected such reasoning referring to a series of common-law precedents upon which it relied in justifying the general language of *Pacific Railroad*. The Court stated (344 U.S. at 154) that the principles expressed in *Pacific Railroad*:

were neither novel nor startling, for the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.

In support of this proposition, the Court cited *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1879); *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. Sup. Ct. 1788); *Parham v. The Justices*, 9 Ga. 341, 348-49 (1851), and 2 Kent's *Commentaries* 338 (14th ed. by Gould, 1896). But a close reading of these authorities indicates that they are either inapplicable or based upon a clear misreading of earlier precedent.

Bowditch was a suit against the City of Boston for damages suffered when Boston firemen destroyed the plaintiff's buildings to prevent the spreading of a fire. The circuit court denied recovery under a Massachu-

setts statute, and this Court affirmed. It should first be noted that the suit was brought under a Massachusetts statute and the entire claim rested on that statute. No claim was made under the Fifth Amendment Just Compensation Clause, and none could, for it had been held that that Clause applied only to the Federal Government. *Barron v. Baltimore*, 7 Pet. (33 U.S.) 243 (1883). And the process of applying the restrictions of the Bill of Rights to the states through the due process clause of the Fourteenth Amendment had not yet begun when *Bowditch* was decided. The Court did go into the common law, however, saying that there was no remedy for the owner. The Court relied upon the *Saltpetre* case, *Mouse's Case*, and *British Cast Plate Manufacturers Co. v. Meredith*, 4 Term Rep. 794, 100 Eng. Rep. 1306 (1792), as well as *Respublica v. Sparhawk*. As we have demonstrated, *Saltpetre* and *Mouse* stand for the exact opposite of the proposition for which they were cited. In *Saltpetre*, it was held that although military necessity gave the Crown a preëemptive right to purchase saltpetre, and a right to come upon private property to dig it, the Crown must pay for the saltpetre and not disturb the land, or replace what it has disturbed. In *Mouse* the holding was that one could throw overboard the goods of another to save a foundering ship, but the loss was to be shared by all.

British Cast Plate Manufacturers Co. v. Meredith was also inapplicable to the facts in *Bowditch*. First, it was a suit against certain commissioners who had been empowered by Parliament to pave a certain road. Plaintiff sued the commissioners individually, claiming that the paving raised the level of the

road, preventing wagons and carriages from passing under the archway into his property. He sought the cost of raising the archway. The court denied recovery on the ground that since the commissioners had not exceeded their jurisdiction they could not be held individually liable. Secondly, the court relied upon the fact that, in the Act authorizing the paving, Parliament had provided an administrative remedy for just such damages as this, and plaintiff was limited to that remedy. Finally, the remaining dictum in the opinion which might have supported *Bowditch*, was disapproved by the House of Lords in *Burmah Oil*, [1964] 2 All E.R. at 355.

Respublica v. Sparhawk, 1 Dall. 357 (Pa. Sup. Ct. 1788), was a decision of the Pennsylvania Supreme Court concerning some flour that had been moved by the State pursuant to a resolution of the Continental Congress—from Philadelphia to Chestnut Hill, in an attempt to keep it from the British who were about to occupy Philadelphia. The British, however, occupied both Philadelphia and Chestnut Hill and seized the flour. Sparhawk presented a claim to the Comptroller-General of the State of Pennsylvania for the value of the flour seized. Upon the denial of his claim, Sparhawk appealed to the State Supreme Court. That court held that, as the Comptroller-General had no jurisdiction over the claim, an appeal could not lie and the court had no jurisdiction. However, the court did go on to say that there was no merit to the claim since the flour was moved by the Pennsylvania Board of War at the behest of the Continental Congress. The claimant argued that, as the Board of War was an agent of the State, the State was responsible for the acts of the

agent on a theory of *respondeat superior*. The Court rejected the claim on the ground that the agent would not have been liable for a taking of necessity, and therefore, the principal could not be liable on a *respondeat superior* theory. The case, if properly analyzed in terms of the action before the Court, supplies no support for either *Caltex* or *Bowditch*.

Parham v. The Justices, 9 Ga. 341 (1851), was an action to enjoin the taking of private property for a road without compensation. The injunction was granted upon the general principles and authorities explored in Part II of this Argument. The Court went on to say, however, that in case of necessity one may take private property for a public use and the individual taking the property was not personally liable, referring once again to the examples of pulling down houses and raising bulwarks for the defense of the state against an enemy. Once again reference was made to *British Cast Plate Manufacturers Co. v. Meredith*, *Saltpetre*, *Mouse*, and *Gedge v. Minne*, 2 Bulst. 60, 80 Eng. Rep. 958 (K.B. 1688), which had also been referred to in *Sparhawk*. That an individual acting for the good of the public cannot be held personally liable in tort, is the force of the *Parham* dicta. The dicta is unassailable, but is immaterial to whether the public, through its government, should share the loss on property taken *pro bono publico*.

Gedge v. Minne, 2 Bulst. 60, 80 Eng. Rep. 958 (K.B. 1688), is equally distinguishable. It held that a person may go upon the land of another to chase and kill a badger, which the court described as "vermine," a "noysome beast" without incurring liability for the

trespass, for the killing of a beast "offensive and hurtful to the common wealth" is a full justification.³¹

Pacific Railroad, also relied (120 U.S. at 234) upon *Taylor v. Nashville & C. R.R.*, 6 Coldwell (46 Tenn.) 646 (1869), and *Mayor of New York v. Lord*, 17 Wend. 285 (N.Y. Sup. Ct. Jud. 1837), affirmed, 18 Wend. 126 (N.Y. Ct. Tr. Imp. & Errors 1837). *Taylor v. Nashville & C.R.R.* concerns whether title passes when property is taken by the state under the doctrine of military necessity and then is sold by the state to another when it is found no longer to be necessary. The court held that upon the taking, title vested in the state and could be passed upon a sale. Nothing was held or said concerning the right of the original owner to compensation from the state for the taking.

Mayor v. Lord arose out of a destruction of a building to stop the spread of fire. A New York statute provided for compensation to the building owner for this destruction. The court was faced with whether the statute should be so construed as to permit compensation for the owner's personalty within the building as well. Chief Justice Nelson referred to the common law to aid the construction of the statute. Referring to the common-law principle of necessity that

³¹ Chancellor Kent (in the 14th edition cited by this Court in *Caltex*) also referred to the common-law cases in concluding that "no action lay at common law by the individual who sustained the injury; but private property must, in many other instances, yield to the general interest." But again, from the cases cited by Kent and particularly by a comparison with the First Edition of his *Commentaries*, Vol. 2, pp. 274-76 (1827), it is clear that he was referring only to a suit by the injured party against the person who pulled down the house, etc.

held harmless an individual who might act to pull down a house or throw overboard goods in order to save a town or ship, Chief Justice Nelson drew the distinction apparently lost sight of in many of the cases between holding the individual liable and having the person's sacrifice shared by the community:

Whatever difference of opinion . . . may exist as to the true construction of the statute, there cannot, I think, be any as to the equity and justice of the claim against the City. It rests upon the great fundamental principle, and which is now incorporated into our Constitution, that private property shall not be taken for public use, without just compensation. It was said, on the argument by the counsel for the City, that the statute did not stand upon this principle, inasmuch as no damages were recoverable at common law. . . . But the obvious answer is, that in all cases of the kind, the individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defense of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle. Const. U.S., Art. 5 of the Amendments.

In all the cases in the books denying the remedy at common law, it is admitted the party may justly claim satisfaction from the public. Thus, in the saltpetre case, the justices say, that "After the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance:" and in *Governor, etc., of Cast Plate Manufs. v. Meredith*, 4 T.R., 797, Buller,

J., remarks: "The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, etc.; this is one of those cases to which the maxim applies, *salus populi, est suprema lex.*"

17 Wend. at 291-292.

One might go on to dispose of case after case in the same manner,³² but the point is clear. There is a doctrine of necessity at the common law, which holds that a person who trespasses on land because of necessity shall not be held liable. A person may pull down a house to stop the spread of fire, or may go onto land to raise bulwarks and ramparts against a common enemy, or may do many other things *pro bono publico*, and the necessity of the situation is a complete defense to an action in tort against him personally. But this doctrine should not and cannot be transposed into a holding that a community shall stand by and benefit when one person's property is taken and used or destroyed for the good of all.

Necessity may give the justification for the taking, use, and destruction, but there is no necessity that one hapless individual shall bear the entire loss. This was the holding of *Burmah Oil Co., Ltd. v. Lord Advocate* [1965] A.C. 75, [1964] 2 All E.R. 348 (H.L.),

³² See the analysis of the old cases in *Field v. City of Des Moines*, 39 Iowa 575 (1864), and Hall and Wigmore, "Compensation for Property Destroyed To Stop the Spread of a Conflagration," 1 Ill. L. Rev. 501 (1907), particularly 514-20.

which held (with two dissents) an oil company entitled to compensation for oil installations and equipment destroyed by the British Army in Burma to prevent their capture by the advancing Japanese—a case on all fours with *Caltex*. In so holding, the House of Lords analyzed the same common-law cases and text writers that this Court relied upon in *Pacific Railroad* and *Caltex*, and concluded that there was no precedent justifying a denial of compensation where private property is destroyed for a public purpose. As for *Caltex* itself, the House of Lords concluded that, insofar as the Fifth Amendment embodied the common-law principles of just compensation, the result was wholly unsupported by its authorities.³³

We agree with the *Caltex* court to the extent it looks to these common-law principles in construing the Just Compensation Clause. But as the House of Lords concluded in *Burmah Oil*, these principles furnish no support for the *Caltex* holding. Hence it ought to be unequivocally overruled on the ground that it is fundamentally at odds with the Fifth Amendment, and our modern understanding of the Government's responsibilities to its citizens.

³³ Lord Reid, writing the principal opinion, advised that, if this Court's decisions in *Pacific Railroad* and *Caltex* constituted a construction of the common-law antecedents to the Fifth Amendment, "I am afraid I must disagree" [1965] A.C. at 11, [1964] 2 All E.R. at 361.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded for a determination of the amount of compensation due petitioners.

Respectfully submitted,

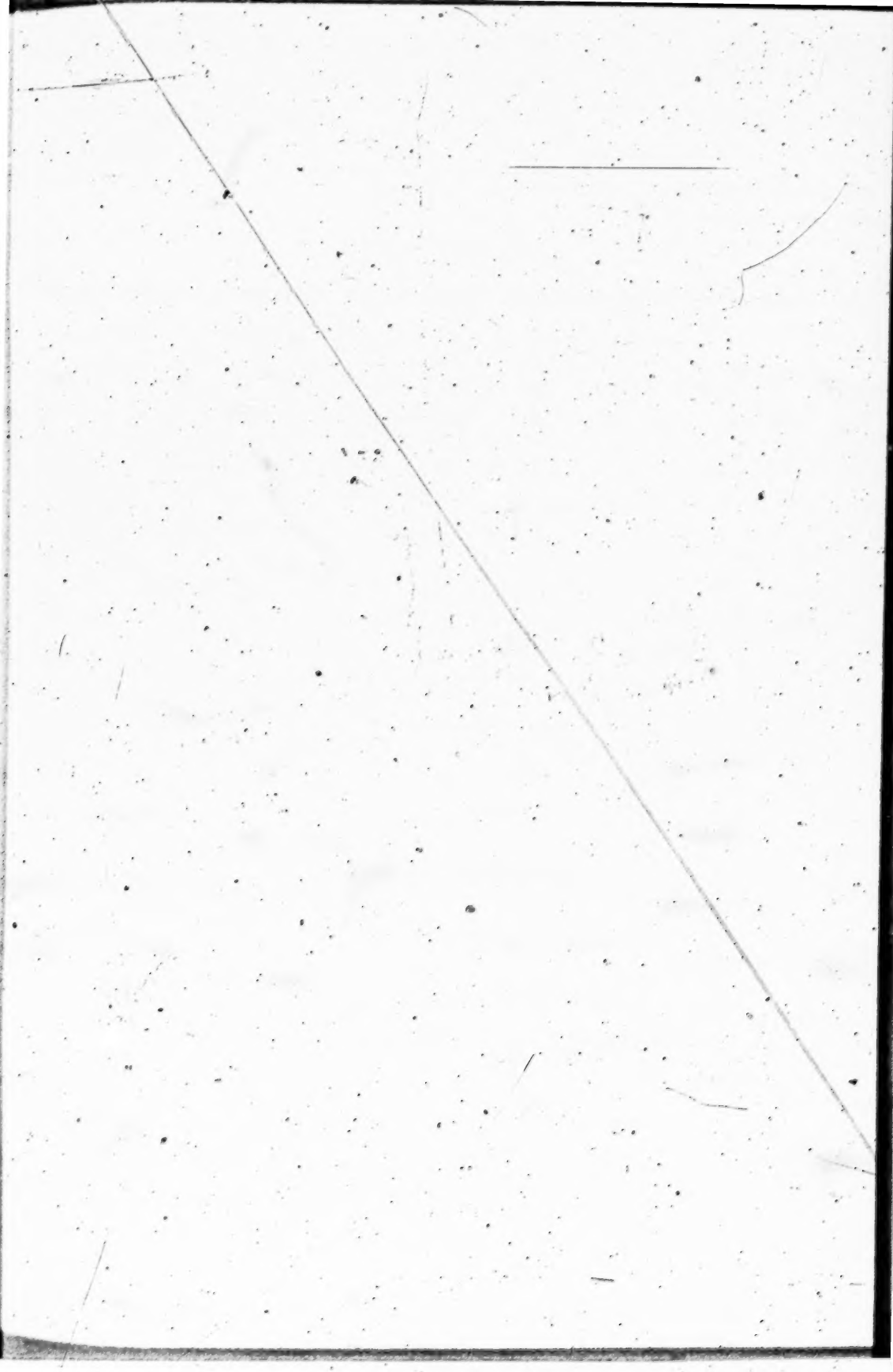
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN
ASSOCIATIONS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (J.A. 199a) is reported at 396 F. 2d 467.

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The petition for a writ of certiorari was filed on September 12, 1968, and granted on November 25, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation for buildings

damaged further by rioters after the Army had driven them out of the buildings and was, then, forced to retreat into them in its defense of the buildings and the adjacent boundary.

2. Whether this case presents any reason to re-examine *United States v. Caltex*, 344 U.S. 149.

STATEMENT

Petitioners seek to recover from the United States the value of damage inflicted upon their buildings in the Panama Canal Zone by anti-American rioters. The buildings, which are situated directly on the border between the Canal Zone and the Republic of Panama, were only two of many private and government buildings and other property assaulted and damaged during four nights and days of rioting in January, 1964 (J.A. 91a-93a). Petitioners do not seek compensation for all the damage done to their buildings, but only for that which occurred after United States Army troops drove the rioters from them and then occupied them as part of their efforts to protect all property and persons in the Canal Zone, including these buildings, from the rioters.

The exhibits which served as stipulated facts for decision below (J.A. 21a) show that during late 1963 and the first days of 1964, the question of flying the Panamanian flag in the Canal Zone became the subject of growing tension between American residents of the Canal Zone and their Panamanian neighbors (J.A. 26a-34a). On the evening of January 9, groups of Panamanians attempted to fly the Panamanian flag within the Zone, first at Balboa, at the Pacific terminus;

and then at Cristobal, at the Atlantic end of the Canal (J.A. 34a ff., 47a). These groups returned in anger from the Canal Zone to the adjoining Panamanian cities of Panama City and Colon, respectively. As was true throughout the subsequent riots, news of the incidents was broadcast with some heat over local (Panamanian) radio stations and through local newspapers (J.A. 79a ff). Angry, rioting mobs of Panamanian citizens began to form along the border of the Canal Zone at Panama City and Colon, and to a lesser extent in the interior of the country (J.A. 94a). They sought to attack and burn anything identifiably American—business enterprises, official homes and residences, cars bearing Canal Zone license plates, and so on.

When it shortly appeared that local police would be unable to quell or contain the rioters, the Commander of the Armed Forces in the Canal Zone assumed responsibility (J.A. 200a-201a). In order to avoid further inflaming relations with the government of the Republic of Panama, he forbade any movement of troops out of the Canal Zone, and restricted them to using riot weapons, such as tear gas, except for a few instances in which use of firearms was specially authorized in an attempt to suppress sniping (J.A. 165a, 177a-178a). Thus, the troops were deployed on or as near the boundary as circumstances would permit, in confrontation with the major concentration of rioters. The riots persisted through January 13. Over \$2,100,000 worth of private and public property in the Canal Zone, including that for which compensation is claimed in this case, was stolen, damaged, or destroyed during that time (J.A. 91a-93a; see also Hear-

ings on Public Works Appropriations, 1965, Senate Committee on Appropriations, 88th Cong., 2d Sess., Vol. 18, p. 1204).

Colon, at the Atlantic end of the Panama Canal, is an enclave in the Canal Zone, bounded on three sides by the Caribbean Sea and on the southwest, Canal side, by the Zone. The boundary is unmarked and unfenced, running from the sea up the center of Eleventh Street to its intersection with Bolivar Avenue and thence in a southeasterly direction along the center of Bolivar Avenue (J.A. 222a). As can be seen from the map in the Joint Appendix (*ibid.*), the portion of the Canal Zone behind this part of the boundary forms a salient jutting into the city. In this salient, abutting directly on the boundary streets, were the office and storage facilities of the Panama Canal Company (also referred to as the Commissary) and petitioners the Cristobal Masonic Temple and the Cristobal Y.M.C.A.

The Commander of the Army troops whose actions form the basis of the claims in this case stated, as part of the stipulated record (J.A. 158a ff.), that he and approximately 700 troops arrived in Cristobal at about 10:15 p.m. on the evening of January 9 under orders "to clear the rioters from the Canal Zone [and] seal the border * * *" (J.A. 159a). He found about 400 rioters in the vicinity of the three buildings of the salient, breaking their windows and apparently looting.¹ He sent one company of troops to clear this

¹ The Chief of Police described the scene at the Y.M.C.A. before the troops arrived as follows (J.A. 102a).

When we entered the Y.M.C.A. it was a scene of utter destruction. All of the light fixtures—the globes were broken. The furniture was broken and strewn about the floor. The

area, and another company, further down Bolivar Avenue. There were practically no rioters in this second area. "Most all of the rioters were operating in the three buildings located along the border in the Canal Zone which was the Commissary building, the Masonic Temple and the Y.M.C.A. where mass destruction was going on" (J.A. 160a). The troops were able to expel the rioters from the Zone, with some scuffling; the rioters remained along the Panamanian side of the border, throwing rocks, sticks, bottles, and other objects, and the troops took up positions in the street, along the boundary line.

By the early morning hours of the 10th, the hostile crowd around the salient had grown to 2,000 to 3,000 persons. Sniper fire and the throwing of Molotov cocktails became "quite heavy" (J.A. 163a). When a man was wounded, the troops were moved inside and to the rear of each of the buildings. By late morning the Y.M.C.A. was on fire; crowds of up to 600 roamed the streets in the vicinity of the salient throughout the day. On the next day, Molotov cocktails gutted the Commissary building; on January 12, they set the second floor of the Masonic building on fire. Ultimately, three soldiers were killed and others wounded by snipers; eighty-three more were injured by thrown objects (J.A. 170a). With the policy which had been set, however, the troops made no effort to cross the border to apprehend snipers or others but used teargas in an attempt to disperse crowds and push them back

water fountain had been torn from the wall and was laying on the floor and the water was flowing out all over. A steel grille gate which surrounded the merchandise section was crushed to the floor and there was a large group estimated up to 100 people running all about the place breaking things and some were carrying merchandise out the front door.

behind the border; it was not until the afternoon of January 11 that selected personnel were authorized to fire at the snipers (J.A. 165a).

The fact sheet prepared by the General Counsel of the Army, also a part of the stipulated record (J.A. 95a ff.), contains a similar description of the events. It, too, indicates that the rioters were principally in and around the buildings of the salient when the troops arrived; that the troops at first took up positions on the boundary itself, in the centers of Eleventh Street and Bolivar Avenue; and then were forced to take positions in and behind the salient buildings, including petitioners', by the continuous barrage of Molotov cocktails, debris, and sniper fire. The troops maintained these positions as long as they could, to protect the property involved and to carry out their orders to clear and seal the Zone.

Petitioners subsequently filed administrative claims with the Army seeking compensation under 10 U.S.C. 2733 for the damage which occurred to their buildings after the Army had initially expelled the rioters; they disclaimed damages caused by the earlier rioting or by the troops in first clearing the Zone (Br. 16 n. 22). When these claims were denied (J.A. 12a-13a), petitioners filed this action in the Court of Claims (J.A. 2a). They characterized as a taking for "public use" the troops' retreat into and behind the buildings and subsequent defense from that vantage of the border and the buildings; and they sought "just compensation" under the Fifth Amendment on this basis. On cross-motions for summary judgment (J.A. 17a, 20a, 21a, 198a), a majority of the court rejected petitioners'

characterization of the stipulated facts; it found, instead, that the government had used the property temporarily, under the compulsion of military necessity in battle-like conditions, and consequently had no duty of compensation (J.A. 207a-208a). Judge Davis, dissenting, believed the troops had used the buildings "as a place of refuge and defense"; that the assaults by Panamanians on the buildings "came about because, and after, the United States troops had entered and occupied them * * * 'so as to expose that property particularly to enemy fire'"; and that, consequently, Fifth Amendment compensation must be paid for the damage the rioters thereafter inflicted on them (J.A. 215a-216a).

SUMMARY OF ARGUMENT

Petitioners argue this case as if the troops involved had especially chosen their buildings in particular as refuges where they could be safe from the rioting mob, and by doing so had drawn the rioters to a place where they otherwise would not have been and into acts which they otherwise would not have committed. We submit that this is an artificial view of the facts. The troops came to and defended the border area where petitioner's buildings were because that is where the rioters were. Because their authority was limited to the area within the Canal Zone and because they were not authorized to employ weapons as deadly as those the rioters were employing against them, they were required to take shelter if they were to continue to defend the Zone. They took shelter in all three buildings on the border where the rioters were; all three were subject to the rioters' attack. The damage

in this case was inflicted solely by hostile forces and only because the storm of battle passed over them and back again.

We argue in the first instance that property owners, whom the government seeks to protect in the course of civil disturbances, ought not be afforded priority in sharing whatever community funds are available to redress the damage done. Although in this case the calamity was not so great nor the government resources so slight that the government would be unable both to pay this claim and to carry out its other programs, the applicability of the constitutional requirement of just compensation to states and municipalities makes such a dilemma possible in the future. The problems of reconstruction which arise after a widespread calamity are not best solved by giving a priority of claim to those persons whose property a government seeks most directly to protect.

Moreover, no holding has indicated that the Fifth Amendment requires compensation for damages inflicted on private property as a result of government action where the government has acted under the compulsion of a public emergency. On the contrary, the established doctrine of "public necessity" recognizes the right of public officers to enter and use private property without need for compensation if they do so under the immediate compulsion of a community emergency which requires their action. This doctrine has been applied both in domestic cases directly involving the Fifth Amendment and in international cases applying common principles of justice. The only exception suggesting liability is an occasionally recog-

nized rule of international law, the so-called "target" doctrine, which awards damages if it is found that the troops of one country intentionally acted in the conduct of war particularly to expose the property of a resident alien to enemy fire. In all cases in which this doctrine has been applied, however, the military had selected the site in advance and thus could be said intentionally to have drawn the enemy's fire to that point. The theory is thus inapplicable on the facts of this case, since the troops here made no choice, but defended the boundary from every available, tenable location in the rioters' vicinity.

We agree with petitioners that there is no occasion to reexamine this Court's decision in *United States v. Caltex*, 344 U.S. 149. The only respect in which that decision is significant here is that it recognizes the public necessity doctrine. The possibly controversial holding of that case, that deliberate government destruction of property to deny its use to the enemy falls within the area of public necessity, is not an issue here; for here, the government was acting to protect, not to destroy, the property in question. Rather than constituting an extension of *Caltex*, this case falls squarely within that aspect of the public necessity doctrine which has been almost unanimously recognized by the cases and commentaries. As was stated by a member of the majority in *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All Eng. Rep. 348, 394, "In respect of a house that has the misfortune to be in the centre of a battle field and is inevitably demolished * * *, it is clear, on the principles which have been almost unanimously set out, that the subject can have no claim."

ARGUMENT

I. THE ENTIRE RIOT MUST BE VIEWED, AS A SINGLE TRANSACTION

Although argument to the facts would ordinarily be inappropriate in this Court, the case was decided below entirely upon the exhibits of record in this Court, which, with limited exceptions, are reproduced in the Joint Appendix. In many respects, the issues in this Court are not so much issues of principle as issues how the facts are to be characterized in light of generally agreed principles. Thus, as will appear *infra*, pp. 25-28 and n. 12, if the facts were as the dissent characterized them (J.A. 213a-216a), a case for government liability might have been made out. We therefore deem it appropriate to begin with a brief discussion of the characterization issue.

Petitioners' case depends on a view of the facts artificially limited both in time and in space. They argue that the troops' entry into their buildings in retreat from the mob constituted a discrete taking for public use; and that once the troops were in their buildings, their presence drew the mob to a spot where they might not otherwise have been and made the buildings a special target for attack. In doing so, they depict the riots as if they occurred only along the Bolivar Avenue boundary between Cristobal, Canal Zone and Colon, Panama, between Eleventh and Twelfth Streets, and after midnight of January 9. Implicitly, they assume that the troops had some choice as to the location from which they would defend the Zone's boundaries, buildings and property, and made a free or deliberate choice of petitioner's buildings in partic-

ular as suitable sites. They concede that the government is not liable for the damage the rioters did before the troops arrived, or even for the damage the troops did in expelling them, but insist that it is liable for the damage the rioters did after the troops had expelled them and were holding them at bay.

Properly viewed, however, the riots were a single transaction, which began early in the evening of January 9, in the absence of any troops. Although this case is concerned solely with what happened in Colon-Cristobal, the riots constituted a Zone-wide, even nationwide, anti-American upheaval which resulted in extensive damage to life and property throughout Panama and the Canal Zone. The rioters of Colon chose the site for their part in this upheaval, congregating from the start in and around all three buildings of the salient—the Commissary, the Masonic temple, and the Y.M.C.A.; the troops came to this spot because the rioters were there. They came under orders to seal the border and to protect and preserve Canal Zone property, including the buildings; their authority to expel rioters was limited by the border, which ran down the center of the streets on which the buildings stood, and by understandable restrictions on the weapons which they could employ. In the give and take of the riots, the troops first entered the buildings of the salient—all of them—and drove the rioters out, and then had to retreat back into and through the buildings—all of them—in their efforts to protect the Zone. There was a continuous "pitched battle" (J.A. 204a) around the salient, a battle not divided into parts in any significant way.

Petitioners' buildings were not isolated places freely or deliberately chosen because of their suitability for defense of the Zone. Together with the Commissary, which also was occupied, they marked the border of the salient where the rioters had been from the start. Once the rioters had been expelled, the troops could not have left the boundary without opening it to renewed incursions and these bordering buildings to further damage. Once the sniper fire and Molotov cocktails forced them to move back from the boundary itself, they had to occupy the buildings unless they were to leave the boundary entirely open at that point. They occupied all the buildings along the boundary where the rioters were, and all the buildings were subjected to the rioters' assault. Thus, the buildings were used and damaged only because the storm of battle passed over them and back again.² The damage was inflicted solely by the hostile forces; it was the presence of those forces that had drawn the troops to the salient and not *vice versa*.

II. PROPERTY OWNERS WHOM THE GOVERNMENT SEEKS TO PROTECT IN THE COURSE OF CIVIL DISTURBANCES OR PUBLIC CALAMITIES OUGHT NOT TO BE AFFORDED PRIORITY IN SHARING WHATEVER COMMUNITY FUNDS ARE AVAILABLE TO REDRESS THE DAMAGE DONE

Viewed strictly with reference to the equities involved, petitioners' claim that governmental bodies should compensate persons in their position for dam-

² The fact that after peace was restored (Pet. Br. 5) the Army required alterations in the buildings to minimize danger and damage from any subsequent rebellion has no bearing on this case. At most, it reflects a lesson learned from this encounter. The presence of command and observation posts in the Masonic temple simply reflects that, located as it is at the point of the salient, it was at the heart of this encounter.

age rioters do is unconvincing. Such damage may occur, as here, in the course of widespread, destructive riots. Doubtless, much of the destruction will be visited upon persons who have no claim that the government, by entering or even standing before their property, appropriated it to public use and invited attack. If required to act as an insurer of those it had sought most directly to protect, some communities may be rendered unable adequately to assist others harmed in the same calamity.

In the present case, of course, the calamity was not so great, nor are the government's resources so slight, that the government's ability both to pay this claim and to carry out necessary rehabilitation would be put in doubt if it were held liable. But since the Fifth Amendment's requirement of "just compensation" is applicable through the Fourteenth Amendment to the states, *e.g.*, *Fiske v. Kansas*, 274 U.S. 380, and through them to municipalities, it is not unreal to suppose that a ruling in petitioners' favor might raise a problem in the future. Cf. *Louisiana v. Mayor of New Orleans*, 109 U.S. 285; Note, *The Burmah Oil Affair*, 79 Harv. L. Rev. 614, 626. It would seem hard to distinguish from petitioner's the claim of a store-owner that a policeman guarding his store during urban riots made it a target for the Molotov cocktails that set it ablaze; or, claims from owners of cars behind which police crouched while working their way around a mob. Nor is it clear that one would wish officers engaged in emergency riot control to add to the factors they must consider the possible condemnation costs or rights involved in protecting one or another neighborhood or building, or of using one or another line of advance or retreat.

As we said in the context of war-time destruction,

It is impossible not to regret the losses incurred by the respondents through no fault of their own. It is also true that if Congress chose, as a matter of grace, to reimburse American property owners for the relatively small amount of their property which was destroyed to deny it to the enemy during World War II, no serious financial consequences would ensue. However, the fact that other nations have had occasion to apply this military policy on a large scale warns that the Fifth Amendment should not be construed to place upon the United States a rigid obligation to pay which, under certain conditions, might create impossible financial burdens for the Government.

Given the destructiveness of any future warfare, responsible governments need to retain freedom of action to deal with great devastation in terms of over-all reconstruction needs and priorities. In such circumstances, for example, much battle damage, admittedly non-compensable under the Fifth Amendment, might require priority for restoration out of public funds over damage as to which the decision below imposes an absolute obligation upon the United States. The prime purpose of such a reconstruction program would be to insure the replacement of essential facilities, rather than to put cash in the pockets of former property owners. Thus, Section 104(c) of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 130, requires that payments made under that Act be used to replace or repair the damaged property or, where that is impossible, "reinvested in such manner as will further the rehabilitation or

economic development of the Philippines." Such problems of reconstruction after destructive warfare cannot be solved by creating rigid legal rules for the payment of compensation for particular types of war damage.*

In our view, the same reasoning should control this case, where riot damage is at issue.

It is clear that communities were never held liable for riot-inflicted damage at common law; nor is there any instance of such liability being imposed as a matter of constitutional necessity. "[R]emedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified * * *"³ *Louisiana v. Mayor of New Orleans*, 109 U.S. 285, 291 (Bradley, J., concurring). Although statutes making municipalities liable for *all* riot damage done to citizens were not uncommon, the policy behind these statutes was to encour-

* See also Section 20, Part I, War Damage Act, 1943, 6 & 7 Geo. VI, c. 21:

The Treasury shall give directions to be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed.

³ Brief for the United States in *United States v. Caltec*, No. 16, O.T. 1952, pp. 18-19.

age municipalities to form police brigades and take other measures which might ultimately lessen the incidence and cost of riot damage. *City of Chicago v. Sturges*, 222 U.S. 313, 323; see also *Wells Fargo & Co. v. Mayer and Alderman of Jersey City*, 207 Fed. 871 (D. N.J.), affirmed, 219 Fed. 699 (C.A. 3), certiorari denied, 239 U.S. 650; *Mr. Paint Shop, Inc. v. City of Rochester*, 254 N.Y.S. 2d 728; *Hart's Food Stores, Inc. v. City of Rochester*, 255 N.Y.S. 2d 390; *Finkelstein v. City of New York*, 47 N.Y.S. 2d 156, affirmed, 53 N.Y.S. 2d 465, 269 App. Div. 662, affirmed 295 N.Y. 730, 65 N.E. 2d 432. Nichols, *The Law of Eminent Domain*, Sec. 1.43[3] (3d ed.). The principle of liability which petitioners urge, however, is exactly the contrary; if acknowledged, it would tend to promote the claims of those persons who did receive police protection during riots over the claims of those who did not. While the statutes make the community's potential liability an incentive for it to protect all citizens, the ruling petitioners urge might create incentive not to.

III. FIFTH AMENDMENT COMPENSATION FOR DAMAGE INFLECTED ON PRIVATE PROPERTY AS A RESULT OF GOVERNMENT ACTS IS NOT DUE WHERE THE GOVERNMENT ACTS WITHOUT DELIBERATION, BUT UNDER THE COMPULSION OF A PUBLIC EMERGENCY.

Of course, the considerations just discussed cannot govern if the Fifth Amendment requires that the actions of the troops in protecting the Canal Zone generally, and petitioners' buildings and the Commissary in particular, be considered a taking for public use for which compensation must be paid. But we believe

no such holding is required. The facts of this case do not bring it within the established Fifth Amendment categories. To the contrary, the facts fall readily into the "public necessity" exception, regarding which there is general agreement that compensation need not be paid.

A. THIS CASE DOES NOT PRESENT A COMPENSABLE TAKING FOR PUBLIC USE UNDER THIS COURT'S PRIOR CASES

Under the principles of eminent domain, a taking requires an intention, express or implicit, to impose a servitude. A servitude is not implied and imposed by a single or rare temporary use. *Peabody v. United States*, 231 U.S. 530; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1; *Sanguinetti v. United States*, 264 U.S. 146, 149-150. Unintended, consequential damages incident to a public undertaking must be borne without any compensation. *Transportation Co. v. Chicago*, 99 U.S. 635, 642; *Mitchell v. United States*, 267 U.S. 341, 345; *Gibson v. United States*, 166 U.S. 269; *Bedford v. United States*, 192 U.S. 217, 224; *Jackson v. United States*, 230 U.S. 1, 23.

Petitioners set out at length various situations resembling one or another element of the present fact situation in which this Court has found a constitutional taking. But while the government was required to pay compensation for its temporary occupation of a coal mine, *United States v. Pewee Coal Co.*, 341 U.S. 114, and of leaseholds, *United States v. Petty Motor Co.*, 327 U.S. 372; *United States v. General Motors Corp.*, 323 U.S. 373, it was clear in each of these cases that the government intended to assert complete do-

minion over the property taken, for its sole benefit and adverse to the owners' interests, over a substantial period of time. Where the government was held to have taken easements by its use of planes, *United States v. Caushy*, 328 U.S. 256, and shore guns, *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, this Court stressed the continuing, as opposed to occasional, character of the use. Compare *Peabody v. United States* and the first *Portsmouth Harbor Land & Hotel* case, *supra* p. 17. And, although petitioners assert that "intent to take is not a crucial factor," Pet. Br. 15, in the cases they cite the taking has been an inevitable consequence of the government's action—as where rising waters behind a dam eroded a riparian owner's land, *United States v. Dickinson*, 331 U.S. 745—so that a general, if not specific, intent to take has been present; and, in each of these cases, the use, again, has been of a continuous character,* entirely adverse to the plaintiff's interest. As this Court said in *Caltex, supra*, 344 U.S. at 156, "No rigid rules

* *Dickinson* states that a constitutional "taking" occurs when one would say, as between private parties, that a servitude had been created on the land. 331 U.S. at 748. Such a relationship, it indicated, would arise only by agreement or over the course of time. Moreover, the only mention of the "servitude" concept in public emergency cases suggests that there is a preexisting servitude impressed on all private property for the government's access under the compulsion of emergency. *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277. Thus, the government need "take" nothing, for it already possesses the right to enter. We need not and do not argue, however, that the government may exercise its access right, however often emergencies occur, without ever incurring an obligation of compensation. On this record, it suffices that the entry was occasional, and hence insufficient to justify petitioners' claim.

can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." See also *Armstrong v. United States*, 364 U.S. 40, 48. But in no case has the Court found a taking for public use where property, located by chance at the heart of an emergency situation, is temporarily entered by public officers for the purpose of dealing with that emergency, and under the compulsion of that emergency situation.*

B. UNDER THE ESTABLISHED DOCTRINE OF "PUBLIC NECESSITY," COMPENSATION IS NOT DUE FOR DAMAGE INFLICTED UNDER THE COMPULSION OF A PUBLIC EMERGENCY

This case falls squarely within the established doctrine of "public necessity," which recognizes the right of public officers to enter and use private property without need for compensation if they do so under the compulsion of a community emergency. Petitioners' principal citations and discussion concern cases in which the existence of a state of necessity at the time

* Since petitioners' claim is that their buildings were taken for use when the main body of troops fell back from the boundary and reentered them, they would be entitled to compensation, if at all, without regard to the damage the rioters did. That is, had the troops been entirely successful and no damage been done, petitioners still would have a claim for the value of three days' use of their facilities. Given the emergency situation which required the troops' presence—compare *Brigham v. Edmonds*, 73 Mass. (7 Gray) 359, where militia were engaged in annual training exercises—none of the cases petitioners cite suggests that such a claim would be honored. Indeed, the existence of that situation makes plain that the troops' presence was not adverse to petitioners' interest. Throughout Panama, mobs were attacking and burning "American" property, whether or not troops were there to guard it. The alternative was to protect the buildings and boundary from within or not to protect them at all.

public officers acted was the principal question. In general, the decisive factor in these cases has been the possibility of deliberate action or choice by the officials concerned. That possibility was clearly lacking here.

1. *There is no liability for damage inflicted under the compulsion of a municipal emergency*

As this Court noted in *United States v. Caltex*, 344 U.S. 149, 154 and n. 6, during a municipal emergency, the government may, "with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." See, also *Surocco v. Geary*, 3 Cal. 69, 73-74; *Field v. Des Moines*, 39 Iowa 575; *Taylor v. Plymouth*, 49 Mass. (8 Metc.) 462; *Keller v. Corpus Christi*, 50 Tex. 614; *Aitken v. Wells River*, 70 Vt. 308.¹ In each of these cases, as here, the governmental forces were drawn without choice to the site where the conflagration was and had to deal with it at that place. But they presented stronger cases for recovery, for there the community

¹ The two cases *contra*, *Bishop v. Macon*, 7 Ga. 200, and *Mayor v. Lord*, 17 Wend. (N.Y.) 285, affirmed, 18 Wend. 126, have attracted little following. Both concerned claims for personal property stored in the destroyed buildings, and both courts appeared to conclude that the municipality concerned had a choice, at least as to the timing of the destruction, which might have permitted more to be saved. *Mayor v. Lord* has been interpreted as resting on statutory rather than constitutional grounds, *Aitken v. Wells River*, *supra*, at 311, and was cited by this Court only for the proposition that compensation for emergency destruction is not constitutionally compelled, *United States v. Pacific R. Co.*, 120 U.S. 227, 234.

itself had deliberately inflicted the property damage for which compensation was sought, in an effort to halt the wider spread of the emergency. A *fortiori*, compensation should be denied here, where the damage was done by the mob when the riot control measures employed against it proved ineffective.* In this respect, it is as if firemen went into a building neighboring another which was afire, but were unable to prevent the flames from spreading; no one has suggested that their presence at the place where the fire could be fought most efficiently is a constitutional taking of that place.

2. *There is no liability for damage inflicted under the compulsion of war*

a. In general

The decisions relating to emergency action by military forces in the field during wartime lead to the same conclusions. These decisions consistently distinguish between property deliberately taken for the service or subsequent use (however promptly) of the military forces and property damaged or destroyed with no practical range of choice during a hostile engagement. Compensation is allowed for the former, because the property was designedly impressed into public service. *E.g., United States v. Russell*, 13 Wall. 623. It has been denied for the latter as an unavoid-

* On this constitutional claim, it is irrelevant whether the government properly withheld use of means which might more effectively have controlled the rioters, such as earlier or less selective use of deadly weapons.

able consequence of the fortunes of battle.* *United States v. Pacific Railroad Co.*, 120 U.S. 227; *United States v. Caltex*, 344 U.S. 149.

In the *Russell* case, three steamboats were impressed into Army service for periods of from 26 to 60 days; the Court ruled (p. 629) that the "impending public danger" authorized the taking but that there was "an obligation on the part of the government to reimburse the owner to the full value of the service."

In *Pacific Railroad*, railroad bridges were destroyed by the Army to prevent the advance of Confederate forces; the Court distinguished this case from the *Russell* situation as follows (p. 239):

The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."

In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the oper-

* See also the sources discussed in the Appendix, *infra*, pp. 46-57, especially H. Rep. No. 134, 43d Cong., 2d Sess., pp. 266-297. Many losses are attributed solely to the fortunes of war, not to the sovereign. *Lichter v. United States*, 334 U.S. 742, 787-788; *Bowles v. Willingham*, 321 U.S. 503, 517-519; *Omnia Co. v. United States*, 261 U.S. 502; *Franco-Italian Packing Co. v. United States*, 130 C. Cls. 736, 128 F. Supp. 408; *Hongkong & Shanghai Banking Corporation v. United States*, 136 C. Cls. 514, 145 F. Supp. 229; *Aleutian Livestock Company, Inc. v. United States*, 119 C. Cls. 326.

ations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. * * *

In *United States v. Caltex*, 344 U.S. 149, petroleum products and related equipment in Manila were destroyed by the Army in the face of advancing Japanese troops. This Court explained *United States v. Russell*, 13 Wall. 623, and *Mitchell v. Harmony*, 13 How. 115 (where the Army used a merchant's mules and wagons), as cases involving "equipment which had been impressed by the Army for subsequent use by the Army" (p. 153); it found that the *Pacific Railroad* case "is the law today" (at 154), and stated the distinction between compensable and non-compensable damage in terms similar to the above (at 155-156). It held the seizure and destruction non-compensable.

The subsequent dispute over *Caltex* has not concerned the general distinction it recognized between damage inflicted by the fortunes of battle, on the one hand, and taking for use, on the other. That distinction is accepted by all; the critics of *Caltex* argue simply that the battle damage category must be limited to acts necessitated by the immediate demands of battle, and thus should not include so-called "denial de-

struction" when that is undertaken for long-range purposes of war, as it arguably was in that case.¹⁰

Since the buildings in this case were at the center of the battle as the troops found it, and were occupied under the necessities of that battle as it developed, all the authorities would agree that there could be no claim. "In respect of a house that has the misfortune to be in the centre of a battle field and is inevitably demolished * * * it is clear, on the principles which have been almost unanimously set out, that the subject can have no claim." *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All Eng. Rep. 348, 394 (H.L.; opinion of Lord Pearce, for the plaintiff).¹¹

¹⁰ *E.g.*, *Burham Oil Co. v. Lord Advocate*, [1964] 2 All Eng. Rep. 348, 355, 360 (Lord Reid, for the plaintiff), 394 (Lord Pearce, for the plaintiff); Note, *The Burham Oil Affair*, 79 Harv. L. Rev. 614, 621-622 (1966); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 Stan. L. Rev. 617, 620-621. It may be noted that the 3-2 victory of Burham Oil in the House of Lords, on which petitioners heavily rely in criticising this Court's *Caltex* decision, was promptly reversed by an Act of Parliament, The War Damage Act, 1965, c. 18, 45 Hals. Stat. Eng. 1758 (1965), because of the apparent injustice of making possibly huge recoveries available to a group of privileged companies while widows and disabled veterans were limited to sharing what the nation could afford, 79 Harv. L. Rev. at 626. The injustice is not entirely eliminated by careful limitation of damages through a realistic view of what could otherwise have been saved; lives lost in the conflict are not compensated even in that measure.

¹¹ Thus, when De Vattel speaks of "a field, a house, or a garden * * * taken for the purpose of erecting * * * a * * * rampart * * *." *Le Droit des Gens*. Book III, c. 15, Par. 232, (emphasis supplied), cited in petitioners' brief at pp. 22-23, he is speaking of acts "done deliberately and by way of precaution" *i.e.*, matters regarding which there existed some choice consistent

b. Under the "target" doctrine

There is one exception sometimes recognized to this general distinction, and it is on an analogy to that exception that petitioners ultimately rely. The exception arises in international arbitration, where a citizen of country A claims compensation for damage to his property in country B occurring in a war between B and insurgents or a third country. As Whiteman points out, *Damages in International Law*, Vol. 2, 1419 ff. (1937), damages are permitted if it is found that the troops of B acted "so as to expose that property particularly to enemy fire," at 1421, even though it might otherwise be found that the damage constituted "battle damage" for which compensation is not ordinarily awarded.

with the general conduct of war. No compensation is due for "damages, caused by inevitable necessity as for instance, the destruction caused by the artillery in re-taking a town from the enemy. These are merely accidents—they are misfortunes which chance deals out to the proprietors on whom they happen to fall. * * * [N]o action lies against the state for misfortunes of this nature—for losses which she has occasioned, not wilfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy" (*ibid.*). Similarly, the *Case of the King's Prerogative in Saltpetre*, 12 Coke's Rep. 12, 77 Eng. Rep. 1294 (1606), involved acquisition of saltpetre to make gunpowder for subsequent use; in *Attorney General v. DeKeyser's Royal Hotel* [1920] A.C. 508, [1920] All Eng. Rep. 80, the Crown took possession of a London Hotel for subsequent use as headquarters of the Royal Flying Corps; and in *Mouse's Case*, 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608), the goods of one ferry passenger were chosen without particular necessity from among those available to be thrown overboard in a tempest to save all lives. The *Burmah Oil* court would not have found liability if the oil fields had been in the path of the Japanese army, and had been destroyed to slow its advance. [1964] 2 All Eng. Rep. at 360, 394, 399.

In each of the cases in which this doctrine was applied, the military had selected the site in advance, and thus could be said intentionally to have drawn the enemy's fire to that point. *Putegnat's Heirs*, IV Moore, *International Arbitration*, 3718-3720 (1871); *American Elec. & Mfg. Co.*, Ralston's Report 128 (1904); and *Anunziata Petrocelli*, Ralston's Report 762 (1904). In the present case, no such preselection could be found; the troops lined the boundary, facing the rioters where they found them, and retreated into all available buildings along the boundary when that became necessary to its continued defense.¹²

Moreover, a study of the cases shows that the doctrine is particularly suited to the international law context in which it is recognized. Thus, in *Shattuck's Case*, *Rigg's Case*, and *Blumenkron's Case*, IV Moore, *supra*, 3668-3669, compensation was denied on findings that the homes of citizens were equally exposed to damage; *Putegnat's Heirs*, *supra*, stresses as crucial the fact that the damaged property was deliberately

¹² In stating in our opposition to petitioners' motion for summary judgment below that petitioners were entitled to recovery if in fact the troops seized and used their buildings for refuge and defense, we did not mean to suggest that petitioners could recover simply on a showing that greater safety from sniper fire and Molotov cocktails was one factor influencing their retreat. A reading of the opposition as a whole makes plain that our position was exactly as it is here: if there had been a deliberate selection of petitioners' buildings as places specially suited for the safety of the troops, resulting in a drawing of the rioters to the spot whence they did the damage, the government would be liable; but that here the government acted under the compulsion of the existing emergency to use all tenable locations for the defence of the border under attack, and hence was not liable.

chosen for use as a fort. One may infer that the policy behind the doctrine is to discourage preferential choice of foreigners' properties as the site for hostilities, or to assure equal protection of foreigners' properties during conflict. Such considerations are of limited importance within the framework of national law. In any event, it is plain that in this case the government did not draw the rioters to private property so as to spare its own: the Commissary, the third building of the salient, was equally the subject of protection, attack and destruction.

Finally, as petitioners themselves note by the emphasis they supply to quoted passages (Pet. Br. 29, 31), this "target" theory is applicable whether country B's troops are inside or merely in front of the foreigner's property. If applied under the Fifth Amendment in cases such as this one, this theory would lead to extraordinary results. Although, as it happened, petitioners did not need to make the claim, the theory if applicable would have required compensation had the buildings been set afire while the troops were standing in the street just in front of them. Even then, they were drawing sniper fire and Molotov cocktails from the rioters, endangering the buildings as well as themselves; and that, plus the element of exposure-in-particular, is all the theory requires.¹³ But again, the troops did not even draw the rioters into the general area, much less to these two

¹³ It would appear quite arguable, for example, that an Air Force base, missile site or similar installation, makes the area in which it exists a target for enemy attack as against other areas not thus favored.

on petitioners' view
of the facts,

buildings in particular; the rioters were there when the troops arrived.

IV. THIS CASE AFFORDS NO OCCASION TO REEXAMINE THE COURT'S DECISION IN *UNITED STATES V. CALTEX*, 344 U.S. 149

As has already been shown, the only respect in which this Court's *Caltex* decision is significant to this case is its recognition that in cases of "public necessity" arising in either a civil or a military context, the government is not liable under the Fifth Amendment even for damage intentionally inflicted on a person's property. The possibly controversial holding in that case—that deliberate "denial destruction" for arguably long-range purposes of war falls within the "public necessity" class—is not in issue here, since the government was acting to protect, not to destroy, the property in question. Rather than constituting an extension of *Caltex* as petitioners assert, on its facts this case falls squarely within that aspect of the "public necessity" doctrine which has been almost unanimously recognized by the cases and the commentators.

Nonetheless, for the Court's convenience, we have reprinted relevant portions of our *Caltex* brief in an Appendix, *infra*. In response to petitioners' contentions, we rely upon that brief and this Court's opinion.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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APPENDIX

Excerpts from the brief of the United States in *United States v. Caltex*, No. 16, October Term, 1952

ARGUMENT

THE DESTRUCTION DURING HOSTILITIES OF PRIVATE PROPERTY OF MILITARY VALUE, TO PREVENT SUCH PROPERTY FROM FALLING INTO THE HANDS OF THE ADVANCING ENEMY, IS NOT A TAKING FOR PUBLIC USE WHICH REQUIRES THE PAYMENT OF JUST COMPENSATION UNDER THE FIFTH AMENDMENT

The sole question in this case is whether the command of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation," requires the United States to pay for private property of military value which was destroyed by its armed forces to prevent such property from falling into the hands of advancing enemy forces. The decision below is based upon the view that the destruction of property "to deny it to the enemy was as much a public use as if it had been consumed by friendly troops in battle" (IR. 51) and must therefore be paid for under the Fifth Amendment. We contend that the decision is erroneous in that by exalting the supposed equities of this case into a rigid constitutional rule it potentially exposes the United States to financial burdens which no government dares to assume, and in that it disregards the contrary interpretation of the Fifth Amendment by this Court, the Congress and the President.

A. THE UNITED STATES CANNOT ASSUME A RIGID AND UNLIMITED LIABILITY FOR PROPERTY WHICH IT DESTROYS TO DENY ITS USE TO AN ENEMY

In later subsections of the brief, we point out that this Court, the Congress, and the President have all denied liability for property of military value destroyed to prevent its use by the enemy. In this part, we shall treat the matter as *res nova* and detail the underlying considerations making it inadvisable and inappropriate for the Court to lay down any rigid rule, rooted in the Constitution, of liability in such circumstances.

No government assumes a legal obligation to compensate its citizens for property destroyed in battle, whether by the action of its own or enemy forces. Governments do not legally obligate themselves to pay for such damage because it often reaches such proportions that they cannot afford to do so fully, as would be required under any legal principle of just compensation. Property destroyed to prevent it from falling into the hands of the enemy is just as much the result of military operations as battle damage. It is neither practical nor equitable to attach to the former a rigid right to full compensation which concededly does not exist with respect to battle damage.

The property here involved consisted of oil terminal facilities owned by the three respondents and located in Manila, Philippine Islands. The unchallenged findings of the Court of Claims are that the property was requisitioned by the Army on December 27, 1941, "in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (IR. 42) and that the property was destroyed on December 31, when the Japanese forces were entering Manila (IR. 48). It is undisputed that these circumstances justified the destruction of

the property, so that damages could not be recovered from the Army personnel who directed the destruction. *Mitchell v. Harmony*, 13 How. 115, 133.

If the Japanese forces had destroyed the oil terminals while they were in American hands, as by bombing or shelling, the United States clearly would not be obligated under the Fifth Amendment to compensate the respondents for the loss of their property. Similarly, if the Japanese forces had captured the oil terminals intact, and the terminals were then destroyed by the United States, as by bombing or shelling, the United States would be under no obligation to pay for such destruction. *Perrin v. United States*, 4 Ct. Cl. 543, 547-548, affirmed, 12 Wall. 315. These propositions apparently are conceded by the court below (IR. 54) and by the respondents (Br. in Opp., pp. 7-8), on the ground that they would be "due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign" (IR. 54). We submit that, both from the point of view of the owners and in the lack of beneficial use by the United States, there is no basis for distinguishing the destruction of property to deny it to the enemy from the destruction of property by the enemy or while in the enemy's possession. Compensation is not required for either, and for the same reasons.

Viewed realistically, the military situation on December 27, 1941, had rendered the Pandacan oil terminals completely without value to the respondents. If the United States had not systematically destroyed the oil terminals when it did, they would have been in the hands of the Japanese a few hours or a day later. As soon as they were in Japanese possession, American airmen or ground raiders, at the risk of their lives, could have destroyed the terminals without imposing upon the United States any obligation to com-

pensate the owners. It is completely anomalous to say that the Fifth Amendment imposes an obligation to pay because the terminals were thoroughly and safely destroyed while still in American possession to deny their use to the Japanese. The Constitution places no such premium upon the hard way of waging war.¹

From respondent's point of view, it could make no difference whether their terminals were destroyed before or after they fell into Japanese hands. As President Grant, whose authority in military matters will be conceded, stated in vetoing a bill providing payment for a Kentucky salt works which was destroyed by Union forces to deny its use to the Confederacy, "Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?"²

Here, the destruction of the respondents' oil terminals was as much the result of the military situation, rather than a "taking" by the United States, as though it had been destroyed in actual battle. As the dissenting opinion below points out (IR. 60): "There

¹ During World War I, the retreating Allies severely damaged the Rumanian oil fields to deny their use to the advancing Germans (See *infra*, p. 60). In World War II, with Rumania on the side of the Axis powers, only air attack could deprive Germany and her Allies of Rumanian oil. The first American raid on the Ploesti refineries cost 54 planes. *The Army Air Forces in World War II*, vol. II, pp. 477-483. The total cost of depriving the Axis powers of the use of the Ploesti facilities included the loss of 350 heavy bombers. *Id.*, vol. III, p. 298

² Senate Ex. Doc. 42, 42d Cong., 3d Sess.

was no hope of saving the property. If the city were further defended, the property would undoubtedly be destroyed. If it fell into the hands of the Japanese it would certainly be destroyed before they gave it up. In fact, practically all Manila, residential and otherwise, was destroyed in the process of retaking three years later. Any possible value to the plaintiffs was gone whichever horn of the dilemma is taken." In the words of the House Committee on War-Claims, House Report 134, 43d Cong., 2d Sess., p. 284 (the so-called Lawrence report), "A nation should not be liable for property taken to prevent it from falling into the hands of an enemy, because it is impossible to establish any just measure of damages. What is the value of property liable to the imminent impending danger of being taken or destroyed by rebels? Why should the Government pay when the markets of the world could not supply another purchaser?"

The value to its owners of property of military value in the path of an advancing enemy is so hopelessly speculative as to preclude any obligation to pay for its destruction to deny it to the enemy. To paraphrase the Lawrence report, why should the United States pay for the destruction of oil terminals on December 31 which it could destroy on January 1 without any obligation to pay? It was this absence of value to the owners of property thus situated and destroyed by the United States which led Judge Loring to dissent in *Grant v. United States*, 2 Ct. Cl. 551, and prompted even the court below in this case to state (IR. 54) that, "The nearness of the enemy and the causes necessitating the destruction, we feel, made the Army's action lawful and may have a bearing upon the question of damages * * *." [Emphasis supplied.]

Since the destruction of property to deny its use to the enemy is indistinguishable from other war dam-

age, both from the point of view of the owners and in the lack of beneficial use by the United States, the reasons why the United States should not be required to pay compensation are identical. Governments do not *obligate* themselves to pay for battle damage to their citizens' property, whether caused by their own or enemy forces, because they cannot afford to assume what may be enormous obligations. Similarly, governments do not dare commit themselves to pay full compensation for their citizens' property which they destroy pursuant to a policy of defensive devastation. As stated by this Court in *United States v. Pacific Railroad*, 120 U.S. 227, at pp. 233-234, with reference to the Civil War:

The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation.

* * * * *

It is impossible not to regret the losses incurred by the respondents through no fault of their own. It is also true that if Congress chose, as a matter of grace, to reimburse American property owners for the relatively small amount of their property which was destroyed to deny it to the enemy during World War II, no serious financial consequences would ensue. However, the fact that other nations have had occasion to apply this military policy on a large scale warns that the Fifth Amendment should not be construed to place upon the United States a rigid obligation to pay which, under certain conditions, might create impossible financial burdens for the Government.

Given the destructiveness of any future warfare, responsible governments need to retain freedom of action to deal with great devastation in terms of overall reconstruction needs and priorities. In such cir-

cumstances, for example, much battle damage, admittedly non-compensable under the Fifth Amendment, might require priority for restoration out of public funds over damage as to which the decision below imposes an absolute obligation upon the United States. The prime purpose of such a reconstruction program would be to insure the replacement of essential facilities, rather than to put cash in the pockets of former property owners. Thus, Section 104(c) of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 130, requires that payments made under that Act be used to replace or repair the damaged property or, where that is impossible, "reinvested in such manner as will further the rehabilitation or economic development of the Philippines."³ Such problems of reconstruction after destructive warfare cannot be solved by creating rigid legal rules for the payment of compensation for particular types of war damage.

B. EVEN AS AN ORIGINAL MATTER, SUCH DESTRUCTION WOULD NOT CONSTITUTE A TAKING OF PROPERTY FOR PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT

* * * Property may be destroyed without compensation under the doctrine of inevitable necessity—the

³ See also Section 20, Part I, War Damage Act, 1943, 6 & 7 Geo. VI, c. 21:

The Treasury shall give directions to be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed.

doctrine epitomized by the maxim *salus populi est suprema lex*. It is well-settled that the destruction of a house in the path of a conflagration to prevent the spread of the fire is not an eminent domain "taking." *Bowdick v. Boston*, 101 U.S. 16; *Field v. City of Des Moines*, 39 Iowa 575; *Russell v. The Mayor*, 2 Denio (N.Y.) 461; *American Print Works v. Lawrence*, 23 N.J.L. 590, 605-607, 615; *McDonald v. City of Red Wing*, 13 Minn. 38. Similarly, the destruction of a mill and dam during a freshet to prevent the washing out of a highway does not require the payment of compensation. *Aitken v. Village of Wells River*, 70 Vt. 308. And, of particular significance here, it has been held that action by municipal authorities in collaboration with the townspeople to destroy liquor which otherwise would have fallen into the hands of advancing Federal troops during the Civil War was a justifiable, non-compensable destruction. *Harrison v. Wisdom*, 54 Tenn. 99; *Wallace v. City of Richmond*, 94 Va. 204. See also *Parham v. The Justices*, 9 Ga. 341, 349; *Respublica v. Sparhawk*, 1 Dall. (Pa.) 357, 362.

The losses necessarily incident to the actual conduct of hostilities, we submit, stand on no different constitutional footing than these other non-compensable losses. Plainly, the destruction of a basic war material on the field of battle to prevent its imminent capture and use by the enemy is no less a justified destruction of property than the destruction of valuable cedar trees to prevent the spread of cedar rust to apple trees (*Miller v. Schoene*, [276 U.S. 272]) or the destruction of fishing nets to preserve wildlife (*Lawton v. Steele*, [152 U.S. 133]). Property which will undoubtedly be used by the enemy if captured is certainly no less a "nuisance" necessitating abatement than diseased cattle or decayed and unwholesome food

(*North American Storage Co. v. Chicago*, [211 U.S. 306]). Nor can it be thought that the dictates of national self-preservation in the path of war are any less stringent than those of community preservation in the path of conflagration. The considerations of policy underlying the doctrine of inevitable necessity are immeasurably stronger in the circumstances here involved. As applied in the conflagration cases, the destruction of property is held justified even though it benefits but a few individuals. In contrast with that limited public purpose, the destruction of the respondents' properties served a common national need. Here, "*salus populi* is then, in truth, *suprema lex*." *United States v. Pacific Railroad*, 120 U.S. 227, 234.* It is the nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter v. United States*, 334 U.S. at 745. See also *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305.

*The opinion below suggests that the right to destroy another's property under the pressure of overbearing necessity and self-preservation is a right as between individuals and has no connection with the state's right of eminent domain (IR. 51, 55). This attempted distinction errs in two respects. First, it has long been recognized that the Nation possesses the right of self-preservation. *Dennis v. United States*, 341 U.S. 494, 501, 519. And, certainly, the Nation's right of self-preservation is of no less status than that of an individual. Second, the destruction of the respondents' properties was not an exercise of eminent domain but an exercise of the war power, resting upon the doctrine of necessity. *Mitchell v. Harmony*, 13 How. 115; *Ford v. Surget*, 97 U.S. 594, 606; see also 1 Nichols, *The Law of Eminent Domain* (3 Ed.) §§ 1.43, 1.44, 1.44 [7].

C. THIS COURT HAS HELD THAT THE FIFTH AMENDMENT DOES NOT REQUIRE PAYMENT OF COMPENSATION FOR PROPERTY DESTROYED BY THE UNITED STATES TO DENY ITS USE TO THE ENEMY OR OTHERWISE TO PROTECT AMERICAN FORCES

Although recognizing that the destruction of property by either belligerent as an incident to battle does not create an obligation to pay for such property, the court below held that the Fifth Amendment requires payment of compensation for property destroyed to deny its use to the enemy. In so holding, the court relied upon its own earlier decisions in *Grant v. United States*, 1 Ct. Cl. 41 (1863) and *Wiggins v. United States*, 3 Ct. Cl. 412 (1867) and the dictum of this Court in *Mitchell v. Harmony*, 13 How. 115, 133 (1851). At the same time, the court below ignored the rationale of this Court's later decisions in *United States v. Pacific Railroad*, 120 U.S. 227, and *Juragua Iron Co. v. United States*, 212 U.S. 297, which reject the rule of the *Grant* and *Wiggins* cases.

Mitchell v. Harmony, *supra*, was an action for damages brought against an American army officer who, by compelling an American trader to accompany American forces on an expedition into Mexico during the Mexican war, brought about the loss of the latter's property. With respect to the defense that the trader had been required to remain with the army in order to prevent his property from falling into the hands of the enemy, this Court stated (at p. 133) that:

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

Since the suit was against the officer rather than the United States, it is clear, as the court below noted (R. 50), that the suggestion that the United States must pay compensation for property destroyed to deny it to the enemy is entirely dictum.

The question was presented squarely to the Court of Claims in *Grant v. United States, supra*, which involved the destruction by Union forces in Arizona of property of military value to deny its use to advancing Confederate forces. Relying upon Vattel, the minority view in the conflagration cases (see *supra*, pp. 23-24), and the dictum in *Mitchell v. Harmony*, the court below held that such destruction was a taking for public use for which the Fifth Amendment required payment of just compensation. In 1864, a year later, Congress deprived the Court of Claims of jurisdiction over such claims, *inter alia*, arising out of the Civil War (*infra*, pp. 42-43). However, in 1867, *Wiggins v. United States, supra*, involving an analogous set of facts arising out of the American naval bombardment of Greytown, Nicaragua, was decided by the Court of Claims on the authority of its own decision in the *Grant* case.

It should be noted that, in several cases arising under the Act of July 4, 1864, 13 Stat. 381, and the Act of March 3, 1883, 22 Stat. 485, which withdrew jurisdiction over war damage claims from the Court of Claims, the court below subsequently expressed its disapproval, by way of dictum, of the *Grant* and *Wiggins* decisions. *Walker v. United States*, 34 C. Cls. 345, 346; *Presbyterian Church v. United States*, 33 C. Cls. 339, 340; *Heflebower v. United States*, 21 C. Cls. 228, 237-238. In the instant case, the court indicated its awareness that it had itself questioned the rule of the *Grant* and *Wiggins* cases, by stating that (R. 51) "Certain cases decided in this court under the Bow-

man Act (13 Stat. 381) [sic] contained dicta indicating that if the question had been then presented to the court, a contrary result might have been obtained" (citing the *Walker* and *Presbyterian Church* cases).

In any event, with this Court's decision in 1887 in *United States v. Pacific Railroad*, 120 U.S. 227, it was authoritatively established that the Fifth Amendment does not require the United States to pay for property destroyed to deny its use to the enemy. Briefly stated, the facts in the *Pacific Railroad* case were these: During the Civil War, a number of railroad bridges had been destroyed in Missouri, by order of the Federal commanding general, to prevent the advance of the enemy. Other bridges had been destroyed by the Confederate forces during their invasion of the State. To further the operations of its armies, the United States rebuilt four of those bridges, two of which had been destroyed by the Federal forces and two by the Confederate forces. Subsequently, to reimburse itself for the cost of rebuilding the bridges, the United States withheld payments due the Railroad for transportation services rendered. The Railroad brought suit to recover the sums due, and challenged the right of the United States to offset the costs of reconstruction.

This Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the Railroad. In reaching this result, the Court considered exhaustively the nature of government liability for the taking and destruction of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency." (120 U.S. at 239.) Drawing a distinction between property destroyed for military purposes

and property taken for use by the Army, the Court stated with regard to the first category that (*id.* at 233-234):

More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. *For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government.* By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. *Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general.* Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. *The safety of the state in such cases overrides all considerations of private loss. Salus populi* is then, in truth, *suprema lex.* [Italics supplied.]

As to the second category of war losses, the Court declared (*id.* at 239):

In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses

and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell v. Harmony*, 13 How. 115, 134; *United States v. Russell*, 13 Wall. 623.

Concluding that the Railroad was not entitled to compensation for the bridges destroyed, the Court held that, conversely, the Government could not recover for private property values created during military operations (*id.* at 239):

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government. [Italics supplied.]

Respondents' assertions that the *Grant*, *Wiggins*, and *Mitchell* cases were nowhere rejected by the Court

and that the Court's statement that the Government "was not responsible for * * * the burning of bridges" (*id.* at 234) was a "gratuitous dictum" (Br. in Opp., p. 24) are flatly contradicted by the reasoning of the Court and the result reached. Admittedly, the Court was not required to decide whether the Railroad could have recovered in an action for compensation for the destruction of the bridges, since the Railroad had not made a claim for such compensation. It is apparent from the opinion, however, that the Court considered it necessary to decide that question before reaching the question of the Railroad's liability to the Government for the reconstruction of the bridges. If the destruction of the bridges was a taking for a public use within the meaning of the Fifth Amendment, it necessarily followed that the Government could not charge the Railroad for the reconstruction of the bridges. Being obligated to indemnify the Railroad for the destroyed bridges, the Government's reconstruction of the bridges would merely have been in lieu of the payment of just compensation. Indeed, this was the very argument made by the Railroad in its brief before the Court. Citing the *Grant*, *Wiggins* and *Mitchell* cases, the Railroad argued that the Government's claim for compensation rested upon an expenditure which natural justice and equity would require it to make and urged the Court to leave the parties where the events of war had left them. See Brief for the Pacific Railroad, Nos. 728, 1303, October Term, 1886, pp. 26-33.*

* In the Court of Claims, the Pacific Railroad made the same argument as it did in the Supreme Court, relying upon *Vattel* and upon the *Grant*, *Wiggins*, *Mitchell* and *Russell* decisions. See Brief in Court of Claims No. 11,825, December Term, 1884-1885.

As shown above, the Court did not adopt that view of the legal consequences of the destruction. It ruled instead that "while the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies," (*Id.* at 239.) It can hardly be supposed, therefore, that this Court was unaware of the *Grant*, *Wiggins* and *Mitchell* cases, or of the fact that its reasoning was incompatible with statements in those opinions. We think it not without significance that the Court cited the *Mitchell* case solely for the proposition that the Government was liable for the military requisition and use of private property (*id.* at 239). On the other hand, as authority for its pronouncement that Government was not liable for the burning of bridges to "embarrass or impede the advance of the enemy," the Court relied, as we do here, upon the familiar conflagration cases referred to above, pp. 23-24. (*Id.* at 234).

In sum, the issue here presented was necessarily met and fully considered by this Court in the *Pacific Railroad* case. To quote the dissent below, "if the railroad bridges were not 'taken for public use', then neither were the oil terminal facilities at Pandacan." (IR. 59).

* * * * *

D. THE REPEATED REFUSAL OF CONGRESS TO PAY FOR PROPERTY SO DESTROYED IS PERSUASIVE EVIDENCE THAT THE FIFTH AMENDMENT DOES NOT REQUIRE SUCH PAYMENT OF COMPENSATION

The conclusions reached by this Court in *United States v. Pacific Railroad*, 120 U.S. 227, and *Juragua*

Iron Co. v. United States, 212 U.S. 297, find the strongest confirmation in the view of Congress, maintained from the earliest days, that the Fifth Amendment imposes no legal obligation upon the United States to pay for property destroyed to deny its use to the enemy. Even if the question were an open one in this Court, this long-continued Congressional interpretation of the Fifth Amendment would be almost decisive. But, as we have shown, this Court has already accepted the view of Congress that compensation in the circumstances of the present case is "a matter of bounty rather than of strict legal right." *United States v. Pacific Railroad*, *supra*, at 239.

Although Congress had occasion to consider the problem of war claims early in our history, the widespread destruction during the Civil War brought the question to a sharp focus. The passage and veto in 1872 of a bill authorizing the payment of the claim of J. Milton Best, recounted by this Court in the *Pacific Railroad* case (120 U.S. 236-239), resulted in a comprehensive analysis of the general subject of war claims by the House Committee on War-Claims. In 1874, the Committee submitted an elaborate report, usually referred to as the Lawrence Report, H. Rept. 262, 43rd Cong., 1st Sess., as revised and enlarged, H. Rept. 134, 43rd Cong., 2d Sess., pp. 205-297. The considered judgment of the Committee, after a comprehensive study of the various categories of war claims, was that the Government is not liable "to make compensation for the property of a loyal citizen in a loyal State seized and destroyed or damaged by competent military authority—*flagrantè bello*—to prevent it from falling into the hands of the enemy, as an element of strength where warlike operations are in progress or where the approach of the enemy is prospectively imminent." H. Rept. 134, *supra*, pp. 281-297.

With respect to the practice of Congress, the Lawrence Report declares that "notwithstanding anything elsewhere said, the right to compensation finds no sanction by the usage of the Government." (*Id.* at 294.) Turning first to the Revolutionary War, the Report points out that, although property was often destroyed to prevent it from falling into the hands of the enemy, Congress never made any provision for paying such claims nor did the States (*Id.* at 294).

Again, during the War of 1812 property was destroyed by the armed forces of the United States to prevent its capture by the enemy. Contrary to respondents' assertion that "the obligation to compensate under such circumstances was consistently recognized and discharged" (Br. in Opp., p. 18), the action taken by Congress with respect to those claims reveals no established usage or recognition of a legal obligation to pay just compensation. Although, as respondents show, some claims were recognized (Br. in Opp., p. 18), similar claims were denied. See *American State Papers, Class IX, Claims*, No. 243, p. 424; No. 587, p. 835; see also the statement of principles set forth in No. 536, pp. 752-753.

Significantly, although Congress did compensate some claimants, it made no general provision for paying for such losses. If, as respondents contend, compensation in the circumstances of the instant case was considered by Congress to be a legal obligation under the Fifth Amendment rather than a matter of bounty, it is hardly to be supposed that Congress would not have provided for payment in a general enactment. Congress did, in fact, provide generally for the payment of other categories of war losses. By the Act of April 9, 1816, 3 Stat. 261, Congress provided (Sec. 5):

That where any property has been impressed, or taken by public authority, for the use or

subsistence of the army, during the late war, and the same shall have been destroyed, lost, or consumed, the owner of such property shall be paid the value thereof, deducting therefrom the amount which has been paid, or may be claimed, for the use and risk for the same, while in the service aforesaid.

In addition, the Act further provided (Sec. 9):

That any person who, in the time aforesaid, has sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military dépositée, under the authority of an officer or agent of the United States, shall be allowed and paid the amount of such damage: *Provided*, It shall appear that such occupation was the cause of its destruction.

Subsequently, by the Act of March 3, 1817, 3 Stat. 397, Section 9 was limited to:

houses or other buildings, occupied by an order of an officer or agent of the United States as a place of deposit for military or naval stores, or as barracks for the military forces of the United States.

The omission of any provision for payment of the category of losses here involved demonstrates, we believe, that Congress did not deem such losses to be legally compensable.*

*Insofar as the Act provided compensation for houses destroyed by the enemy, it was said in 1818 by the House Committee on Claims to have been enacted as "a law originating in its benignity, and aimed gratuitously for the benefit of any suffering portion of the community." See *American State Papers, Class IX, Claims*, No. 412, p. 590. In this connection, it should be pointed out that one of the private bills relied upon by respondents—the claim of William H. Washington, 6 Stat. 151 (March, 1815)—was a case which came within the policy later adopted in Section 9 of the Act of April 9, 1816. The

Congressional disposition of the claims arising out of the Civil War further substantiates this conclusion. By the Act of July 4, 1864, 13 Stat 381, Congress provided compensation for the claims of loyal citizens in states not in rebellion for quartermaster's stores and subsistence actually furnished to the Army. However, Section 1 of that Act specifically provided:

That the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation^d of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof.

At the expiration of the Civil War, claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Several bills providing compensation for losses sustained in circumstances similar to the present case were passed, but each was vetoed by the President. See Veto Messages of June 1, 1872, Sen. Ex. Doc. No. 85, 42nd Cong., 2nd Sess., for the relief of J. Milton Best; June 7, 1872, Sen. Ex. Doc. No. 86, 42nd Cong., 2nd Sess., for the relief of Thomas B. Wallace; January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess., for the relief of East Tennessee University; February 12, 1873, Sen. Ex. Doc. No. 42, 42nd Cong.,

Government had placed stores in Washington's house, and blew up the house to prevent the stores from being captured by the enemy. *American State Papers, Class IX, Claims*, No. 266, p. 446.

¹ This Act was enacted within a year after the decision of the Court of Claims in the *Grant* case. For the legislative history of the Act, see Cong. Globe, 38th Cong., 1st Sess., pp. 127, 164-168, 261, 282, 909-920, 924-926 (H. R. 66); Cong. Globe, 38th Cong., 1st Sess., pp. 1010, 2774, 2778, 2781, 3188, 3418-3420, 3499, 3513, 3544, 3557 (H. R. 305).

3rd Sess., for relief for the destruction of the Manchester, Ky., saltworks.

As this Court noted in the *Pacific Railroad* case, the claim of J. Milton Best focused attention on the issue and occasioned considerable debate. The history of the claim⁸ is set forth in detail in the opinion in the *Pacific Railroad* case (120 U.S. at 236-239), and will not be repeated here.⁹ We think it pertinent to add, however, that the principles there laid down by the President in his veto message (120 U.S. at 238) were even more forcefully reasserted in his veto of the bill for the relief of the proprietors and lessees of certain salt-works in Manchester, Kentucky (S. 161, 42nd Cong.). Their claim was for the value of the salt-works destroyed in October 1862, by the Union forces in the vicinity of Manchester. Having reason to believe that the Confederate authorities proposed to capture

⁸ Cong. Globe, 41st Cong., 2nd Sess., pp. 1947, 2986-2987 (S. 667), 4587, (H.R. 2240); S. Rep. No. 69, 41st Cong., 2nd Sess.; Cong. Globe, 41st Cong., 3rd Sess., pp. 62-63, 97-102, 165-169, 295-304, 311-319, 1984 (S. 667); Cong. Globe, 42nd Cong., 1st Sess., pp. 22, 84 (S. 105); Cong. Globe, 42nd Cong., 2d Sess., pp. 120, 2252-2253, 3148, 3621-3624, 3648, 3696, 4155-4156 (S. 105); S. Rep. No. 9, 42nd Cong., 2d Sess.; Sen. Rep. No. 412, 42nd Cong., 2d Sess.; Cong. Globe, 42nd Cong., 3rd Sess., pp. 1164, 1680 (S. 105); 2 Cong. Rec., pp. 10, 29, 1665 (43rd Cong., 1st Sess.).

⁹ Contrast the disposition of the J. Milton Best claim with the claim of Josiah O. Armes, referred to by respondents (Br. in Opp., p. 18), for whose relief a private bill had been passed in 1867, 14 Stat. 617. Armes' house had been burned by Federal troops in Fairfax County, Va., to prevent its use by the enemy as a stronghold. See S. Rep. No. 112, 39th Cong., 2nd Sess. The award of compensation appears to have been an exception to the general rule, and a reward made in consideration of the fact that Armes and his wife had been of service to the Federal troops in giving information of the movement and situation of the Confederate forces. See Lawrence Report (H. Rep. No. 134, 43rd Cong., 2nd Sess.) p. 296, note 175.

and appropriate the large supply of salt on hand, the Federal commander had ordered his troops to destroy the salt-works. The loyalty of the claimants was unquestioned. See S. Rep. No. 50, 42nd Cong., 2nd Sess. In vetoing the bill, the President reiterated that the objections made by him to the bill for the relief of J. Milton Best applied with equal force to this bill, declaring that (Sen. Ex. Doc. No. 42, 42nd Cong., 3rd Sess., pp. 1-2):¹⁰

I cannot agree that the owners of property destroyed under such circumstances are entitled to compensation therefore from the United States. Whatever other view may be taken of the subject, it is incontrovertible that these salt-works were destroyed by the Union Army while engaged in regular military operations, and that the sole object of their destruction was to weaken, cripple, or defeat the armies of the so-called southern confederacy.

I am greatly apprehensive that the allowance of this claim could and would be construed into the recognition of a principle binding the United States to pay for all property which their military forces destroyed in the late war

¹⁰ For the history of this claim, see Cong. Globe, 42d Cong., 2d Sess., pp. 1176, 2258, 2259, 2302, 3148 (S. 161); S. Rep. No. 50, 42d Cong., 2d Sess.; Cong. Globe, 42d Cong., 3d Sess., pp. 694-697, 722, 897, 919, 929, 930, 949, 1288, 1309; 4 Cong. Rec. 4364, 4467 (S. 969, 44th Cong., 1st Sess.); S. Rep. No. 444, 44th Cong., 1st Sess., Parts 1 and 2; 6 Cong. Rec. 58, 238 (H.R. 1025, 45th Cong., 1st Sess.); 13 Cong. Rec. 51 (47th Cong., 1st Sess.); S. Rep. No. 710, 47th Cong., 1st Sess.; 15 Cong. Rec. 11, 759 (S. 13, 48th Cong., 1st Sess.); S. Rep. No. 99, 48th Cong., 1st Sess.; 17 Cong. Rec. 1033, 3176 (H.R. 4929, S. 2070, 49th Cong., 1st Sess.); 19 Cong. Rec. 32, 241 (S. 526, H.R. 2315, 50th Cong., 1st Sess.); 21 Cong. Rec. 111, 3413, 6326 (S. 610, H.R. 9407, 51st Cong., 1st Sess.); H. Rep. No. 2500, 51st Cong., 1st Sess.; 23 Cong. Rec. 26, 234 (S. 206, H.R. 2553, 52d Cong., 1st Sess.); 25 Cong. Rec. 329, 2184 (S. 436, H.R. 3699, 53d Cong., 1st Sess.).

for the Union. No liability by the Government to pay for property destroyed by the Union forces in conducting a battle or siege has yet been claimed; but the precedent proposed by this bill leads directly and strongly in that direction; for it is difficult upon any ground of reason or justice to distinguish between a case of that kind and the one under consideration. Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?

This bill does not present a case where private property is taken for public use, in any sense of the Constitution. It was not taken from the owners but from the enemy; and it was not then used by the Government, but destroyed. Its destruction was one of the casualties of war; and though not happening in actual conflict, was perhaps as disastrous to the rebels as would have been a victory in battle.

Owners of property destroyed to prevent the spread of a conflagration, as a general rule, are not entitled to compensation therefor; and for reasons equally strong, the necessary destruction of property found in the hands of the public enemy, and constituting a part of their military supplies, does not entitle the owner to indemnity from the Government for damages to him in that way.

The failure of Congress to take any further action on the J. Milton Best and salt-works claims evinces, we believe, congressional recognition and acceptance of the principles of liability announced by the President. The establishment of those principles is further shown by the history of the bill for the relief of East

Tennessee University subsequent to its veto by the President (S. 490, 42nd Cong.; veto message of January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess.). The University's claim was not for the destruction of property to deny its use to the enemy, but for the damage and destruction which occurred while the property was being used by Federal troops—a claim similar to that of the University of Kentucky, for whose relief a private bill had earlier been enacted on January 17, 1871 (16 Stat. 678). The bill was vetoed by the President because its phrasing made it appear to be a claim for destruction similar to that of J. Milton Best. With the approval of the President, the phrasing of the bill was changed and the bill was subsequently enacted in the succeeding Congress. (S. 110, 43rd Cong.; Act of June 22, 1874, 18 Stat. 604). The congressional discussion of the revised bill reveals quite clearly the acquiescence of Congress in the principles enunciated in the denial of the claim of J. Milton Best. See 2 Cong. Rec. 1317-1319, 5200-5201 (43rd Cong., 1st Sess.).

The usage thus established has apparently continued to this date. As previously noted, *supra*, pp. 42-43, Congress, in 1864, had withdrawn jurisdiction of such claims from the Court of Claims. By the Act of March 3, 1883, 22 Stat. 485, Congress again provided that (Sec. 3):¹¹

The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the Army or Navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the

¹¹ For the legislative history of this Act, see 13 Cong. Rec. 3147-3167, 3184-3206; 14 Cong. Rec. 908-912, 946-953, 3660, 3672-3673.

United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

Again, Civil War claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Adhering to the principles established in the denial of the claims of J. Milton Best and the Manchester, Ky., salt-works, Congress reiterated that "the practice and usage of Government during and since the late civil war is a denial of liability for this class of claims." (S. Rept. 22, 48th Cong., 1st Sess., p. 8). In justification of its position, the Senate Committee on Claims relied in part, as we have, upon the conflagration cases, declaring that (S. Rept. 40, 48th Cong., 1st Sess., p. 2):

There are two classes of cases in which Government, for public ends, deprives the citizen of his property either in war or peace. One is the exertion of the right of eminent domain by which property is taken for public use. This may be for a military use as well as for a peaceful one, as to build a fort or ship, or supply an army. It is, under our Government, exerted by the legislative authority, either directly or by delegation. The other is the right of necessity, where property is used, or destroyed to avert an imminent danger, or supply an immediate and pressing necessity of such a character that private interests must yield to it. Of this class are the destruction of dwellings to prevent the spread of a fire, the building of bulwarks on private ground, the entering houses to prevent felonies or arrest offenders, and the like. We think the error of those persons who insist on the obligation of Government to make compensation in cases like the present, is in placing them in the first of these

divisions. They seem to us to belong to the second. The conflagration of Moscow, the laying Holland under water by destroying the dikes, the destruction of Athens when her people took to their ships, were not process of law or exercise of the right of eminent domain. They were the acts of self-defense of nations in a death struggle, justified only by that overwhelming necessity of self-preservation which for the time being exonerates individuals and nations from all legal restraint whatever.

The right to compensation was again denied by Congress after the Spanish-American War with respect to the claim of William Hardman. Hardman, a British subject, was employed by the Juragua Iron Company and occupied one of its houses in Cuba. His claim * * * was for household goods and clothing destroyed by United States military authorities during that war to prevent an epidemic of yellow fever. Anticipating this Court's decision in the *Juragua* case, the Senate Committee on Foreign Relations declared that, "The United States Army had a right to destroy this property, without making compensation to the owners. They had a right to destroy it as an act of war, and they had a right to destroy it in order to prevent an epidemic of yellow fever." (S. Rept. 224, 57th Cong., 1st Sess., p. 2).

More recently, the doctrine of non-liability was adopted in the Federal Tort Claims Act of 1946, which excludes from the coverage of the Act "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680. To the same effect, see the Military Claims Act (31 U.S.C. 223b) and the Foreign Claims Act (31 U.S.C. 224d).

Where Congress has authorized the payment of compensation for the destruction of, or damage to, property resulting from action taken by the armed

forces of the United States to deny the enemy the use of such property, it has done so as a matter of grace and as part of a broad comprehensive scheme for rehabilitation. Thus, the Philippine Rehabilitation Act of 1946 (60 Stat. 128, 50 U.S.C. App. 1751, *et seq.*)¹² not only authorized payment for the losses resulting from "action taken by or at the request of the military, naval, or air forces of the United States to prevent such property from coming into the possession of the enemy" but also for concededly non-compensable losses resulting from "enemy attack," "action taken by enemy representatives, civil or military, or by the representatives of any government cooperating with the enemy," and "looting, pillage, or other lawlessness or disorder accompanying the collapse of civil authority." (Sec. 102(a), 50 U.S.C. App. 1752(a).) That compensation under this Act is a matter of grace, rather than of constitutional right, is further demonstrated by the proviso of Section 102(a) that, "in case the aggregate amount of the claims which would be payable to any one claimant under the foregoing provisions exceeds \$500, the aggregate amount of the claims approved in favor of such claimant shall be reduced by 25 percentum of the excess over \$500." (50 U.S.C. App. 1752(a).) See also H. Rep. No. 1921, 79th Cong., 2d Sess., p. 9; Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission*, 16 Law & Contemp. Prob. 519.¹³

¹² For the legislative history of the Act, see S. Rep. No. 755, 79th Cong., 1st Sess.; H. Rep. Nos. 1921, 1957, 79th Cong., 2d Sess.; 91 Cong. Rec. 10788, 10828, 11036, 11463, 11470; 92 Cong. Rec. 3392, 3435-3450, 3676, 3773, 3987, 4038.

¹³ The exclusion of the respondent Shell Company from the coverage of the Act, because it is a British corporation (50 U.S.C. App. 1752(b)(4); see Br. in Opp., p. 25), underscores the fact that compensation was not provided in discharge of any constitutional obligation. It is well-settled that friendly alien corporations are protected by the Fifth Amendment. *Russian Volunteer Fleet v. United States*, 282 U.S. 481.

The approach adopted by Congress of providing broadly for the compensation of war claims as a humanitarian rehabilitation measure—a measure similar to those adopted by Great Britain and several European countries¹⁴—suggests a basic fault of the decision below. The widespread “scorched earth” tactics of modern warfare make the payment of full compensation, as a matter of right, a financial impossibility. For economic, as well as humanitarian, reasons, the damages caused by both enemy and friendly forces must be repaired. But the extent of their repair necessarily rests upon the financial strength of the nation at the close of hostilities. If rehabilitation is to be effective, it must be based on considerations of policy which are applicable generally to the nation as a whole rather than on principles of absolute legal liability. The determination of those considerations, we submit, lies with Congress and not with the courts.¹⁵

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¹⁴ See Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 Law & Contemp. Prob. 347; Brooks, *A Survey of Progress Towards Payment of War Damage Compensation in Europe*, 1 Int'l L.Q. 301; Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 Am. J. Int'l L. 748.

¹⁵ Cf. War Damage Insurance Act of 1942, 56 Stat. 174, 15 U.S.C. 606b-2; Marine War Risk Insurance Acts (Act of June 29, 1936, 49 Stat. 1635, as amended, 54 Stat. 689, 56 Stat. 140, 56 Stat. 214, 57 Stat. 47, 58 Stat. 216) 46 U.S.C. 1128-1128h; Sec. 17 of Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 117; Lucas Act of 1946, 60 Stat. 902, 41 U.S.C. 106 note; see also Sec. 8 of the War Claims Act of July 3, 1948, 62 Stat. 1245, 50 U.S.C. App., Supp. V, 2007; Report of War Claims Commission, H. Doc. No. 580, 81st Cong., 2d Sess.; S.J. Res. 171, 82d Cong., 2d Sess.; Cong. Rec., July 5, 1952, pp. 9588-9591.

SUPREME COURT OF THE UNITED STATES

No. 517.—OCTOBER TERM, 1968.

The National Board of Young
Men's Christian Associations
et al., Petitioners,
v.
United States.

On Writ of Certiorari
to the United States
Court of Claims.

[May 19, 1969.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners brought this suit against the United States in the Court of Claims¹ seeking just compensation under the Fifth Amendment for damages done by rioters to buildings occupied by United States troops during the riots in Panama in January 1964. The Court of Claims held that the actions of the Army did not constitute a "taking" within the meaning of the Fifth Amendment and entered summary judgment for the United States. 396 F. 2d 467 (1968). We granted certiorari. 393 U. S. 959 (1968). We affirm.

Petitioners' buildings, the YMCA Building and the Masonic Temple, are situated next to each other on the Atlantic side of the Canal Zone at its boundary with the Republic of Panama. Rioting began in this part of the Zone at 8 p. m. on January 9, 1964. Between 9:15 and 9:30 p. m., an unruly mob of 1,500 persons marched to the Panama Canal Administration Building, at the center of the Atlantic segment of the Zone and there raised a Panamanian flag. Many members of the mob then proceeded to petitioners' buildings—and to the adjacent Panama Canal Company Office and Storage

¹ Jurisdiction in the Court of Claims was based upon 28 U. S. C. § 1491.

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Building. They entered these buildings, began looting and wrecking the interiors, and started a fire in the YMCA Building.

At 9:50 p. m., Colonel Sachse, the commander of the 4th Battalion, 10th Infantry, of the United States Army, was ordered to move his troops to the Atlantic segment of the Zone with the mission of clearing the rioters from the Zone and sealing the border from further encroachment. The troops entered the three buildings, ejected the rioters, and then were deployed outside of the buildings. The mob began to assault the soldiers with rocks, bricks, plate glass, Molotov cocktails, and intermittent sniper fire. The troops did not return the gunfire but sought to contain the mob with tear gas grenades. By midnight, one soldier had been killed and several had been wounded by bullets; many others had been injured by flying debris. Shortly after midnight, Colonel Sachse moved his troops inside the three buildings so that the men might be better protected from the sniper fire.

The buildings remained under seige throughout the night. On the morning of January 10, the YMCA building was the subject of a concentrated barrage of Molotov cocktails. The building was set afire, and in the early afternoon the troops were forced to evacuate it and take up positions in the building's parking lot which had been sandbagged during the night. Following the evacuation, the YMCA Building continued to be a target for Molotov cocktails. The troops also withdrew from the Masonic Temple on the afternoon of January 10, except that a small-observation post on the top floor of the building was maintained. The Temple, like the YMCA Building, continued to be under heavy attack following withdrawal of the troops, the greatest damage being suffered on January 12 as a result of extensive fire bomb activity. The third building under

heavy attack in the area—the Panama Canal Company Office and Storage Building—was totally destroyed on January 11 by a fire started by Molotov cocktails.

On January 13, the mob dispersed, and all hostile action in the area ceased. The auditorium-gymnasium in the YMCA Building had been destroyed, and the rest of the building was badly damaged. The Masonic Temple suffered considerably less damage because of its predominantly concrete and brick construction. Other buildings in the Atlantic segment of the Canal Zone were also damaged or destroyed. These buildings were all located along the boundary between the Zone and the Republic of Panama, and none, except the Office and Storage Building, had been occupied by troops during the riot.

Petitioners' suit in the Court of Claims sought compensation for the damages done to their building by the rioters after the troops had entered the buildings. The basic facts were stipulated, and all parties moved for summary judgment. The court found it "abundantly clear from the record . . . that the military units dispatched to the Atlantic side of the Zone by General O'Meara were not sent there for the purpose or with the intention of requisitioning or taking [petitioners'] buildings to house soldiers. Both buildings had previously been looted and damaged by the rioters. Colonel Sachse's men were ordered to remove the Panamanians from the buildings in order to prevent further loss or destruction and then to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." 396 F. 2d, *supra*, at 473-474. Accordingly, the court held that "the temporary occupancy of [petitioners'] buildings and the damage inflicted on them by the rioters during such occupancy did not constitute a taking of the buildings for use by the Army within the contemplation of the fifth amendment" *Id.*, at

473. The Government's motion for summary judgment was granted, petitioners' motion for summary judgment was denied, and the case was dismissed.

At the outset, we note that although petitioners claim compensation for all the damages which occurred after the troops retreated into the buildings in the early hours of January 10, there was no showing that any of these damages occurred because of the presence of the troops. To the contrary, the record is clear that buildings which were not occupied by troops were destroyed by rioters, and that petitioners' very buildings were under severe attack before the troops even arrived. Indeed, if the destroyed buildings have any common characteristic, it is not that they were occupied by American soldiers, but that they were on the border and thus readily susceptible to the attacks of the mobs coming from the Republic of Panama. We do not rest our decision on this basis, however, for petitioners would not have a claim for compensation under the Fifth Amendment even if they could show that damages inflicted by rioters occurred because of the presence of the troops.

The Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49 (1960); see also *United States v. Sponenbarger*, 308 U. S. 256, 266 (1939).² Petitioners argue that the troops entered their buildings not for the purpose of protecting those buildings but as part of a general defense of the Zone as a whole. Therefore, petitioners contend, they alone should not be made to bear the cost of the damages to their buildings inflicted

² For a general discussion of the purposes of the Just Compensation Clause, see Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

by the rioters while the troops were inside. The stipulated record, however, does not support petitioners' factual premise; rather, it demonstrates that the troops were acting primarily in defense of petitioners' buildings.

The military had made no advance plans to use petitioners' buildings as fortresses in case of a riot. Nor was the deployment of the troops in the area of petitioners' buildings strategic to a defense of the Zone as a whole. The simple fact is that the troops were sent to the area because that is where the rioters were.² And once the troops arrived in the area, their every action was designed to protect the buildings under attack. First, they expelled the rioters from petitioners' buildings and the Office and Storage Building, putting out the fire started by the rioters in the YMCA Building. Then they stood guard outside to defend the buildings from renewed attack by the 2,000 to 3,000 Panamanian rioters who remained in the area. In this defense of petitioners' property the troops suffered considerable losses and were forced to retreat into the buildings.

It is clear that the mission of the troops forced inside the buildings continued to be the protection of those buildings. In a fact sheet, to which the parties have stipulated, the General Counsel of the United States Department of the Army stated that:

"[T]he troops had occupied the buildings in the YMCA-Masonic Temple vicinity *under instructions to protect the property*, [and] their actions, according to all statements taken, were consistent with instructions. A captain, in his affidavit, states that he was given a message by the battalion commander

² It is significant that at the outset of the rioting Colonel Sachse sent one of his companies—"B" Company—to an area several blocks away from petitioners' buildings. It was only because "[t]he number of rioters in the 'B' Company area was practically none" that "B" Company was subsequently sent to the area near petitioners' buildings.

to convey to the officer who had been placed in charge of the Masonic Temple. The order was, in the captain's words, '... that if the rioters attempted to enter the building with the intent to do damage to persons or property that appropriate action ... could be used. ...' According to the captain, the order went on to state, '... Those people on the 1st floor could assume that rioters forcibly entering the building had the intent to do damage to either property or persons.' The officer in charge received the order, and it was passed along to the men. One sergeant's affidavit names the officer, and recounts receiving the order from him, in the sergeant's own words, *'The building would be defended at all costs.'*

"Other statements by individual soldiers describe actions taken to minimize damage which the rioters were attempting to cause. Several soldiers describe throwing and firing rifle-launched tear gas grenades at rioters who were hurling Molotov cocktails at the buildings. Another describes using similar agents 'to keep the crowd from entering the YMCA,' while still others describe action by themselves or other soldiers in physically routing Panamanians from the YMCA after they had come in through the windows." (Italics supplied.)

Colonel Sachse, the commanding officer in the Atlantic riot area, testified to the same effect:

"The YMCA building was on fire from Molotov cocktails being thrown from the Republic of Panama side into the front of it. We were unable to protect it due to the fact that it is set on the border between the Canal Zone and the Republic of Panama. Therefore we lost most of this building by Molotov cocktails."

Thus, there can be no doubt that the United States Army troops were attempting to defend petitioners'

buildings. Of course, any protection of private property also serves a broader public purpose. But where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. See *Armstrong v. United States*, *supra*, at 49; *United States v. Sponenbarger*, *supra*, at 266. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside.

Petitioners' claim must fail for yet another reason. On oral argument, petitioners conceded that they would have had no claim had the troops remained outside the buildings, even if such presence would have incited the rioters to do greater damage to the buildings. We agree. But we do not see that petitioners' legal position is improved by the fact that the troops actually did occupy the buildings. Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation. See, e.g., *United States v. General Motors*, 323 U. S. 373, 378 (1945). There are, however, unusual circumstances in which governmental occupation does not deprive the private owner of any use of his property. For example, the entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises. In the instant case, the physical occupation by the troops did not deprive petitioners of any use of their buildings. At the time the troops entered, the riot was already well underway, and petitioners' buildings were already under heavy attack. Throughout the period of occupation, the buildings could not have been used by petitioners in any way. Thus, petitioners could

only claim compensation for the increased damage by rioters resulting from the presence of the troops. But such a claim would not seem to depend on whether the troops were positioned in the buildings. Troops standing just outside a building could as well cause increased damage by rioters to that building as troops positioned inside. In either case—and in any case where government action is causally related to private misconduct which leads to property damage—a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment. The Constitution does not require compensation every time violence aimed against government officers damages private property. Certainly, the Just Compensation Clause could not successfully be invoked in a situation where a rock hurled at a policeman walking his beat happens to damage private property. Similarly, in the instant case, we conclude that the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment. We have no occasion to decide whether compensation might be required where the Government in some fashion not present here makes private property a particular target for destruction by private parties.

Affirmed.

MR. JUSTICE STEWART, concurring.

If United States military forces should use a building for their own purposes—as a defense bastion or command post, for example—it seems to me this would be a Fifth Amendment taking, even though the owner himself were not actually deprived of any personal use of the building. Since I do not understand the Court to hold otherwise, I join its judgment and opinion.

SUPREME COURT OF THE UNITED STATES

No. 517.—OCTOBER TERM, 1968.

The National Board of Young
Men's Christian Associations
et al., Petitioners,
v.
United States.

On Writ of Certiorari
to the United States
Court of Claims.

[May 19, 1969.]

MR. JUSTICE HARLAN, concurring in the result.

At the time the military retreated into the YMCA and the Masonic Temple, three alternative courses of action were open to the army commander. First, the troops could have continued their prior strategy and stood their ground in front of the buildings without returning the rioters' hostile sniper fire; second, the troops could have stood their ground and attempted to repel the mob by the use of deadly force; third, the troops could have retreated from the entire area, leaving the mob temporarily in control. The petitioners argue that if the troops had adopted either of the first two of these alternative strategies, their buildings would not have suffered the damage which resulted from the military's occupation.

But what if the military had adopted the third strategy open to it? If the army had completely abandoned the area to the rioters, and regrouped for a later counter-attack, there can be little doubt on this record that the rioters would have subjected the buildings to greater damage than that which was in fact suffered. I believe this fact to be decisive. For it appears to me that, in riot control situations, the Just Compensation Clause may only be properly invoked when the military had

reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all.

I.

I start from the premise that, generally speaking, the Government's complete failure to provide police protection to a particular property owner on a single occasion does not amount to a "taking" within the meaning of the Fifth Amendment. Every man who is robbed on the street cannot demand compensation from the Government on the ground that the Fifth Amendment requires fully effective police protection at all times. The petitioners do not, of course, argue otherwise. Yet surely the Government may not be required to guarantee fully effective protection during serious civil disturbances when it is apparent that the police and the military are unable to defend all the property which is threatened by the mob. If the owners of *unprotected* property remain uncompensated, however, there seems little justice in compensating petitioners, who merely contend that the military occupation of their buildings provided them with *inadequate* protection.

Petitioners' claim that they may recover on a bare showing that they were afforded "inadequate" protection has an additional defect which should be noted. If courts were required to consider whether the military or police protection afforded a particular property owner was "adequate," they would be required to make judgments which are best left to officials directly responsible to the electorate. In the present case, for example, petitioners could argue that it was possible for the troops to maintain their position in front of the buildings if they had been willing to kill a large number of rioters. In rebuttal, the Government could persuasively argue that the indiscriminate use of deadly force would have en-

raged the mob still further and would have increased the likelihood of future disturbances. Which strategy is a court to accept? Clearly, it is far sounder to defer to the other duly constituted branches of government in this regard.

It is, then, both unfair and unwise to favor those who have obtained some form of police protection over those who have received none at all. It is only if the military or other protective action foreseeably *increased* the risk of damage that compensation should be required. Since, in the present case, the military reasonably believed that petitioners' property was better protected if the troops retreated into the buildings, rather than from the entire area, the property owners have no claim to compensation on the ground that the protection afforded to them was "inadequate."

I must emphasize, however, that the test I have advanced should be applied only to government actions taken in an effort to control a riot. The Army could not, for example, appropriate the YMCA today and claim that no payment was due because the building would have been completely demolished if the military had not intervened during the riot. Once tranquility has been restored, property owners may legitimately expect that the Government will not deprive them of the property saved from the mob. But while the rioters are surging through the streets out of control, everyone must recognize that the Government cannot protect all property all of the time. I think it appropriate to say, however, that our decision today does not in any way suggest that the victims of civil disturbances are undeserving of relief. But it is for the Congress, not this Court, to decide the extent to which those injured in the riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owns.

II.

While I agree with the Court that no compensation is constitutionally available under the facts of this case, I have thought it appropriate to state my own views on this matter since the precise meaning of the rules the majority announces remain obscure at certain critical points. Moreover, in deciding this particular case we should spare no effort to search for principles that seem best calculated to fit others that may arise before American democracy once again regains its equilibrium.

The Court sets out two tests to govern the application of the Just Compensation Clause in riot situations. It first denies petitioners recovery on the ground that each was the "particular intended beneficiary" of the Government's military operations. *Ante*, at 7. I do not disagree with this formula if it means that the Fifth Amendment does not apply whenever the policing power reasonably believes that its actions will not increase the risk of riot damage beyond that borne by the owners of unprotected buildings. But the language the Court has chosen leaves a good deal of ambiguity as to its scope. If, for example, the military deliberately destroyed a building so as to prevent rioters from looting its contents and burning it to the ground, it would be difficult indeed to call the building's owner the "particular intended beneficiary" of the Government's action. Nevertheless, if the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied for the same reasons it is properly denied in the case before us. Cf. *United States v. Caltex*, 344 U. S. 149 (1952).

Moreover, the Court's formula might be taken to indicate that if the military's *subjective* intention was to protect the building, the courts need not consider whether this subjective belief was a reasonable one.

While the widest leeway must, of course, be given to good-faith military judgment, I am not prepared to subscribe to judicial abnegation to this extent. If a court concludes, upon convincing evidence, that the military had good reason to know that its actions would significantly increase the risk of riot damage to a particular property, compensation should be awarded regardless of governmental good faith.

While I accept the Court's "intended beneficiary" test with these caveats, I cannot subscribe to the second ground the majority advances to deny recovery in the present case. The majority analogizes this case to one in which the military simply posted a guard in front of petitioners' properties. It is said that if the rioters had damaged the buildings as a part of their attack on the troops standing in front of them, the property damage caused would be too "indirect" a consequence of the military's action to warrant awarding Fifth Amendment compensation. It follows, says the Court, that even if the military's occupation of the buildings *increased* the risk of harm far beyond any alternative military strategy, the Army's action is nevertheless too "indirect" a cause of the resulting damage.

This argument, however, ignores a salient difference between the case the Court hypothesizes and the one which we confront. If the troops had remained on the street, they would not have obtained any special benefit from the use of petitioners' buildings. In contrast, the military did in this instance receive a benefit not enjoyed by members of the general public when the troops were ordered to occupy the YMCA and the Masonic Temple. As the Court's statement of the facts makes clear, the troops retreated into the buildings to protect themselves from sniper fire. Ordinarily, the Government pays for private property used to shelter its officials,

and I would see no reason to make an exception here if the military had reason to know that the buildings would have been exposed to a lesser risk of harm if they had been left entirely unprotected.

On the premises set forth in this opinion, I concur in the judgment of the Court.

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MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court says that "Shortly after midnight, Colonel Sachse moved his troops inside the three buildings [which included the two buildings for which compensation is here sought] so that the men might be better protected from the sniper fire." *Ante*, p. 2. The Army selected those two buildings to protect themselves while carrying out their mission of safeguarding the entire zone from the rioters. Thus, the Army made the two buildings the particular targets of the rioters and the buildings suffered heavy damage. The Army's action was taken not to save the buildings but to use them as a shelter and fortress from which, as the Court of Claims found, "to seal off the border from further incursions by the rioters into the Atlantic portion of the Canal Zone." 396 F. 2d 467, 474 (1968). At that time, I think it can hardly be said that these private buildings were taken for the good of the owners. Instead the taking by the Army was for the benefit of the public generally. I still feel that "the guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss." *United States v. Caltex, Inc.*, 344 U. S. 149, 156 (1952) (dissenting opinion of Mr. JUSTICE DOUGLAS).